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VOL. 6—IOWA REPORTS.

Dec 4

51

REPORTS
OF
CASES IN LAW AND EQUITY
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA.

BY W. PENN. CLARKE,
REPORTER.

VOL. VI.

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Rec June 5, 1860

OFFICERS OF THE SUPREME COURT.

JUDGES.

HON. GEORGE G. WRIGHT, Keosauqua, CHIEF JUSTICE.
" WM. G. WOODWARD, Muscatine, } JUDGES.
" L. D. STOCKTON, Burlington, }

CLERK.

LEWIS KINSEY, Des Moines.

ATTORNEY-GENERAL.

SAMUEL A. RICE, Oskaloosa.

REPORTER.

W. PENN. CLARKE, Iowa City.

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ERRATA.

On page 103, in line 13 from the top, for "Dover," read *Gover*.

On page 167, in line 14 from the bottom, for "limitation," read *consideration*

On page 188, in line 12 from the bottom, for "Letter 6," read *Letter C*.

On page 256, in line 19 from the bottom, for "or," read *for*, and in line 15 from the bottom, for "were," read *was*.

On page 289, in line 19 from the bottom, for "received," read *raised*.

The case of *McMillen et al. v. Boyles, County Judge*, on page 304, and that of *McMillen et al. v. The County Judge and Treasurer of Lee County*, is in fact but one case. Chief Justice WRIGHT and Judge WOODWARD, wrote separate opinions, in order to present their different views of the questions involved. The opinions being entitled differently, they were furnished to the Reporter as separate cases, and he was not advised of the error until after the cases were in type.

On page 489, in the fifteenth line from the bottom, strike out the word "second."

On page 500, in the twelfth line from the bottom, insert a — (dash) between "test" and "the," and in the twentieth line from the bottom, insert the word *as*, between "be" and "suggested."

CASES
IN
Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF

THE STATE OF IOWA;

DES MOINES, JUNE TERM, A. D. 1858.

In the Fifteenth Year of the State.

PRESENT:

HON. GEORGE G. WRIGHT, CHIEF JUSTICE.

“ WM. G. WOODWARD, } JUSTICES.
“ L. D. STOCKTON, }

WOODWARD v. WHITESCARVER *et ux.*

An appeal may be taken to the supreme court, from a judgment rendered by default, or a decree *pro confesso*.

Where a judgment is taken by default, it should appear affirmatively, that there has been such service and compliance with the provisions of the law, as gives the court jurisdiction over the person of the defendant; and it is clearly irregular to take such judgment, where the record discloses the fact, that there has not been such service and compliance.

A defendant, at the time of the service of the original notice, has a right to demand a copy of the petition, and to require that it be sent to a particular person, at a given place; and it is irregular to take a decree or judgment by default, when it appears that the copy of the petition was sent to another person, at a different place.

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Where in an action to foreclose a mortgage, it appeared from the return on the original notice, that the defendants demanded a copy of the petition, and required it to be sent to J. F. S., attorney, Keosauqua, Iowa; and where, at the appearance term of the court, it was made to appear, that a copy of the petition had been sent by mail to the residence of defendants, and that defendants had failed to answer, and thereupon a decree *pro confesso* was rendered against them; *Held*, That there was no sufficient service, and the judgment was irregular.

Appeal from the Lee District Court.

SATURDAY, APRIL 10.

Bill in chancery, to foreclose a mortgage, and correct a mistake in the description of the land therein set out. The notice was served by the sheriff of Van Buren county, who made the following return thereon: "This notice came into my hands, July 8, 1856, and was served, same day, on F. A. Whitescarver, by reading the same to him, and giving him a copy thereof; served on Jane R. Whitescarver, August 19, 1856, by reading the same to her. Copy of petition demanded, to be sent to J. F. Smith, attorney, Keosauqua, Iowa." At the September term, 1856, the respondents having failed to plead, answer, or demur, according to the rules of court, and it appearing that a copy of the petition had been sent by mail to the residence of defendants, and the court having heard the evidence, and being fully advised in the premises, found that respondents did execute the mortgage mentioned in the petition, and that the sum of money intended to be secured thereby had not been paid. A decree was thereupon entered, purporting to correct said mistake, and ordering the sale of the land, as thus corrected, to satisfy the amount found due complainant. Respondents appeal.

Cowen & Worthington, for the appellants.

Edwards & Turner, for the appellee.

WRIGHT, C. J.—A preliminary question first demands

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our attention. Appellee insists that an appeal does not lie from a judgment by default, or decree *pro confesso*, but that respondents should have pursued their remedy in the court below. Whatever may be the rule in other states, it would seem that in our courts, the question is no longer an open one. It has been the constant practice, from the organization of the territorial and state courts, to review such cases on appeal, or writ of error. And in *Doolittle v. Shelton*, 1 G. Greene, 271, it was expressly decided that a judgment by default might be brought to this court by writ of error, but that, in considering the same, no original matter would be acted upon.

The statute then in force, gave the supreme court jurisdiction "over all final and interlocutory orders, judgments, and decrees of the district courts." The language of the Code is: "Over all final judgments and decisions of any of the district courts, as well in cases of civil actions, properly so called, as in proceedings of a special or independent character." Jurisdiction is also given on appeals from intermediate orders, involving the merits, and materially affecting the final decision." Sections 1555, 1556.

If an appeal or writ of error was properly allowed in this class of cases, under the former statute, much more clearly may they be reviewed on appeal in this court, under the provisions of the Code above cited. *Broghill v. Lash*, 3 G. Greene, 357; *Harrison v. Kramer et al.*, 3 Iowa, 543; *Carr v. Kopp*, Ib., 80; *Byington v. Crosthwait*, 1 Ib., 148.

The case is, then, properly before us, and we, therefore, proceed to consider the positions urged by appellants to reverse this decree. And, it seems to us, that, upon one ground at least, the decree is irregular, and should be set aside. The Code provides that when the notice is served personally, the return must state whether a copy of the petition was required, and if so, to what point it was to be directed. Section 1723. What would be the proper rule, if the record stated that a copy had been sent as required, or if it was silent in this respect, we need not now deter-

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mine. In this case, the return of the sheriff states, that a copy of the petition was demanded, which was to be sent to J. F. Smith, attorney, Keosauqua, Iowa, whereas the decree recites that a copy was sent by mail to the residence of the defendants. Now, this provision has, of course, a meaning, and was designed to accomplish some practical purpose. When the defendant is served, he has a right to demand a copy of the petition, and to instruct the sheriff to what point it shall be directed. These facts are to be stated by the sheriff in his return; and for what purpose? We answer, that the plaintiff may have notice, and comply with the requirements of the defendant.

The proper return was made in this case, but it was not complied with on the part of the complainant. It is true that it appeared to the court, that a copy had been sent by mail to the residence of respondents. But this was not what they required. They had a right to require that it should be sent to their attorney, at any named point, and it was irregular to take a decree or judgment by default, when it was shown to have been sent to the residence of the defendants. They did not require this. For reasons, not necessary to be known, nor material to be inquired into, they asked that it should be sent to an attorney at Keosauqua. It may be that they contemplated being, and were in fact, absent from home at the time; that they had retained Smith as their attorney, and left the defence and management of the case to him; and to say that their requirement was complied with, by sending the copy by mail to their residence, would defeat the clear purpose and object of the Code. Not only so; but, even granting that to send a copy to them would have answered the requirement to send it to their attorney, a further difficulty is, that the record shows that it was sent to their residence, and not to the point or place named in the return of the sheriff.

If the return had stated generally, that it was to be sent to their residence, then it might answer, to show, by proper proof, that it was directed to such residence. But when

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it is directed to be sent to a particular point, it will not do to make it appear that it was sent to the residence of defendants. The record should show, in such a case, to what point it was sent, and it should not be left to the plaintiff to determine where the defendants' residence is, and swear or prove generally, that it was thus sent. Where a judgment is taken by default, it should appear, affirmatively, that there has been such service and compliance with the provisions of the law, as gives the court jurisdiction over the person of the defendant. And it is clearly irregular to take such judgment, where the record discloses the fact, that there has not been such service and compliance.

Respondents also insist that the decree should be reversed, because their equity of redemption is foreclosed to a tract of land different from that contained in the mortgage, or that claimed to be the true description in the bill. As complainants, however, say that the transcript in this respect is not correct, and that no such variance appears in the decree, as entered in the court below, and for the further reason that the cause must, for the error above considered, be reversed and remanded, we forbear passing upon the second question.

Decree reversed.

BLEIDORN v. ABEL *et al.*

The revenue act of 1847, was repealed by the Code, without any saving of the remedies existing at the time of the repeal, for the collection of taxes levied and delinquent; and there was no authority under the Code, for selling in 1852, lands delinquent for the taxes of 1848.

A county treasurer's deed of real estate, made under a sale in 1852, for the delinquent taxes of 1848, conveys no title to the purchaser at such sale.

Under the revenue act of 1847, there could rightfully be no judgment against, or sale of, the lands, in 1852, for the unpaid taxes of 1849 and 1850. Such a sale could only take place in pursuance of a judgment in the district court, against the lands, for the taxes due and unpaid, which judgment could only be rendered upon a return of the county

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treasurer, showing that the taxes had remained due and unpaid for the term of two years from the first day of January next, after the delinquent list had been filed in his office.

A sale of lands in 1852, by a county treasurer, for the delinquent taxes of 1849 and 1850, derives no support from the provisions of the Code, as under section 496, the treasurer was authorized to sell in each year, only the lands upon which the taxes levied the preceding year, remained unpaid.

No authority to sell lands for the unpaid taxes of any year prior to 1851, was vested in the county treasurers, until the passage of the act entitled "An act to enforce the claims of the state and county against lands and lots, on which the owners have failed to pay the taxes charged thereon, prior to 1851," approved January 22, 1853.

A decree of foreclosure under a tax deed for lands sold in 1852, for the delinquent taxes of 1851, will not affect the interest of any person claiming a title to, or lien upon, the lands, previous to the tax sale, not a party to the suit.

In proceedings to foreclose the equity of redemption under a tax deed, as in proceedings to foreclose a mortgage, all incumbrances, whether prior or subsequent, not made parties, are not bound by the decree.

In a proceeding by an assignee to foreclose a mortgage, as against the mortgagor, and other parties claiming title under a tax deed under the Code, which tax deed has been foreclosed against the mortgagor, and where the conclusive effect of the decree of foreclosure under the tax deed, depends upon the fact, whether or not the complainant was a prior incumbrancer upon the land, the respondents who claim under the tax title, are entitled to demand that the complainant makes out his right to a decree against the mortgagor, by sufficient testimony.

Appeal from the Johnson District Court.

SATURDAY, APRIL 10.

Bill to foreclose three mortgages on certain real estate in Johnson county, executed by John F. Heyne and wife, to Bell and Hull, to secure the payment of certain promissory notes, which mortgages and notes had been transferred to the complainant. The first mortgage is dated August 4, 1846; the second, October 23, 1846; and the third, August 5, 1847. After the execution of the mortgages, and on the first of September, 1849, Heyne and wife conveyed the premises to Schröder. Heyne and wife, Schröder, and the Abels, who were in possession of the

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premises, and claimed title thereto, by virtue of certain tax deeds, were made respondents. The petition alleges that two of the notes secured by the said mortgages have been lost, and calls upon the Abels to disclose their title.

The respondents, Heyne and wife, did not answer. Schroeder confessed the bill. The Abels answered under oath, and admit the execution of the mortgages by Heyne and wife. They further say, that they possess no knowledge, information, nor belief, as to whether any or all of the notes in said mortgages described, or any part thereof, remain due and unpaid; nor as to whether any of said notes have been lost; nor as to whether Oliver Wetmore was the attorney of John R. Hull and Thompson Bell, the mortgagees, and authorized to transfer and assign said mortgages to the complainant—as to all which matters they call for proof. The said Abels, also, claimed title to the premises, under and by virtue of four tax deeds, executed to Alexander Abel, by the treasurer of Johnson county, as follows: 1. A deed for the taxes of 1848, dated July 26, 1854; 2. A deed for the taxes of 1849, dated April 19, 1852; 3. A deed for the taxes of 1850, and a deed for the taxes of 1851, both dated April 19, 1852. The first two deeds were made under the revenue act of 1844, and the last two, under the Code. The equity of redemption under the last two deeds, was foreclosed against Heyne and wife, and all persons claiming under them, which proceedings are made a part of the answer. The decree of foreclosure was rendered November 2, 1853. The new matter set up in the answer of the Abels, was denied by the complainant.

On the hearing of the cause, the complainant offered in evidence, a letter of attorney from Peter McLaren, the first assignee of one of the mortgages, and under whom complainant claimed, to Oliver Wetmore, and a similar letter from Hull, the other mortgagee, to Wetmore, authorizing the said Wetmore to transfer the said mortgages, which were objected to by the respondents, the Abels, for the following reasons:

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1. That said letters of attorney were not admissible in evidence, without proof of the same, either by calling the subscribing witness, and proving the signature of the grantor, or by accounting for the absence of the said subscribing witness, and proving the signature either of such witness, or of the grantor.

2. That the certificates of acknowledgment to said letters of attorney, did not show that the said grantors were personally known to the officers taking the same, nor that they were proved to be the persons who signed the same, by a credible witness.

The court sustained the objection, and excluded the evidence, to which the complainant excepted. He then offered in evidence, the three mortgages, and the notes said mortgages were given to secure, except those alleged to be lost, with the assignments thereon, which purported to have been made by McLaren and Hull, by Oliver Wetmore, their attorney—to which the respondents objected, for the reasons following:

1. That there was no legal evidence that Oliver Wetmore was the attorney of the said McLaren and Hull, and authorized to assign the said notes and mortgages to the complainant.

2. That in order to show title to the notes and mortgages in the complainant, the authority of Wetmore to make the assignments to him, must be shown.

The objection was overruled, and the evidence admitted—to all which the respondents excepted. The complainants then offered in evidence, copies of two notes alleged to be lost, to which the respondents objected, for the reasons following:

1. That there was no evidence of the loss of the said notes;

2. That in the absence of said notes, and in the absence of proof of their loss, the presumption was that they had been paid;

3. That there was no evidence that said notes had ever been assigned to complainant.

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The court overruled the objection, and admitted the evidence, to which the respondents excepted. The complainant then offered in evidence, the said deed from Heyne and wife to Schroeder, dated September 1, 1849, which was objected to by the respondents, for the reasons following:

1. That the acknowledgment of said deed, did not show that the grantors were personally known to the officer taking the same, nor were they proven by one credible witness, to be the persons whose names were subscribed to said deed.

2. That said certificate of acknowledgment did not show that the said Henrietta Heyne, was acquainted with the contents of said deed, nor that she relinquished her dower in said premises.

The objection being overruled, the deed was admitted in evidence, to which respondents excepted. The complainant here rested his case. The respondents, the Abels, to sustain the issue on their part, then offered in evidence, a judgment rendered in the district court in Johnson county, at the March term, 1852, against the lands described in the said mortgages, for taxes assessed for the years 1847 and 1848, and the tax deeds, and proceedings in foreclosure under the Code, as set up in the answer, to all which the complainant objected, but the objection was overruled, and the evidence admitted, to which the complainant excepted. The court found the equity of the cause to be with the respondents, the Abels, and dismissed the bill of the complainant, with costs. From this decree, the complainant appeals.

Geo. D. Woodin and Wm. E. Miller, for the appellant.

The parties making defence have no legal title whatever in the land. It was sold April 19, 1852, for the taxes due for the four years preceding, and three deeds therefor executed to Alexander Abel—one deed under the law of 1847, for the taxes due for the years 1847 and 1848; the

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second, under the Code, for the taxes of 1849, and the other, for the years of 1850 and 1851. We claim that all of these deeds are void. The statute of 1847, had been repealed before the sale; and under it, after its repeal, the treasurer had no right to proceed to collect the taxes for the years of 1847 and 1848. Blackwell on Tax Titles, 553; *McQuilkin v. Stoddard*, 8 Blackf., 581; Dwarris on Stat., 676; *Butler v. Palmer*, 1 Hill, 324; *Hunt v. Jennings*, 5 Blackf., 135; *Bruce v. Schuyler*, 4 Gilm., 221; *Brown v. Vrazie*, 25 Maine, 359; *Eldridge v. Tibbitts*, 5 Lou., 380; Smith's Com., 890. The same principle is clearly recognized, although in the decision of another question, in *Wright v. Marsh*, 2 G. Greene, 94; *Plymouth v. Jackson*, 15 Pa. State, 44; *Butler v. Chariton Co.*, 13 Missouri, 112; *Fletcher v. Peck*, 6 Cranch, 87. But if the sale was legal, and this deed valid, the respondents have failed to support it by the proper proof. The only evidence offered in its support, was the record of the district court, at the March term, 1852, condemning the land to sale. We desire on this point, only to refer to *Scott v. Babcock*, 3 G. Greene, 133.

The other deeds executed at the same time, for the taxes due for the years 1849, '50 and '51, are also void. Under the provisions of the Code, the treasurer had no authority to sell lands for taxes becoming due before its enactment. There is no provision that it shall apply to taxes then delinquent, but only to those thereafter to become due. To remedy this, the general assembly passed the act of 1853. Until that act took effect, the taxes remaining unpaid for any year prior to 1851, could not be collected under the provisions of the Code. No revenue law is to have a retrospective action, unless the language of the law is clear and explicit. Blackwell on Tax Tit., 561; *Garrett v. Wiggins*, 1 Scam., 335; 5 Monroe, 129; 7 Johns., 447; 3 Maine, 333; *Quackenbush v. Doe*, 1 Denio, 128. And it may be laid down as a general rule, that in determining the validity of a tax title, the case must be governed by the law as it stood at the time of the assessment and sale.

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Blackw., 562; *Brown v. Vrazie*, 25 Maine, 359. At the time of the assessment of the taxes for the years prior to 1851, the old law was in effect. The assessment cannot be made under one law, and the sale under another. In the case before referred to, *Bruce v. Schuyler*, 4 Gilm., 221, it was decided, that when the statute was repealed after the sale, but before the deed was executed, the officer should make the deed, from the fact that the purchaser had acquired rights under the law, before its repeal; but the case clearly recognizes the principle, that a sale for taxes cannot be made under one law, and the assessment under another; and also, that the sale could not be made, after the repeal of the act under which the assessment took place.

If the position be correct, that at the time of the sale, the treasurer had no right to sell the land for the taxes due prior to 1851, we think this deed is void, from the fact that it covers the taxes for 1849 and 1850, as well as those for the year 1851. There is no way of dividing the purchase money, and the purchaser cannot say, because the treasurer had a right to sell the land for the taxes of 1851, therefore he has authority to proceed and foreclose for all that his deed may contain. The deed covering the taxes for 1849 and 1850, is rendered void, although it likewise contains those for the year 1851. If land be sold for the non-payment of taxes, one of which is legal, and the residue illegal, the sale is void. Blackw., 192, 329; *Wallingford v. Fiske*, 24 Maine, 386; *McQuilkin v. Stoddard*, 8 Blackf., 582; *Weed v. McQuilkin*, 8 Ib., 835; *Hayden v. Foster*, 13 Pick., 492; *Kemper v. McClelland*, 19 Ohio, 824; *Ellwell v. Shaw*, 1 Greenl., 335; *Huse v. Merriam*, 2 Ib., 375; *Drew v. Davis*, 10 Vt., 506.

We claim the sale of this land to be void, for another reason: It contains three separate tracts, all of which were sold together. The Code, (page 84,) provides, that it shall be listed in parcels, and consequently sold in the same manner. But even if the statute were silent upon this point, it appears clear that several tracts should not be included in the same bid, and all sold in a body. Other-

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wise, one piece of land may be compelled to pay the taxes due upon another, and one man to pay those belonging to another. Such a sale is illegal and void. *Shimire v. Inman*, 36 Maine, 228; *Willey v. Scoville*, 9 Ohio, 43; *Pitkin v. Gow*, 18 Ill., 253; *Andrews v. Senter*, 32 Maine, 394; *Morton v. Harris*, 9 Watts, 319; *Hayden v. Foster*, 18 Pick., 492.

Is the decree of foreclosure under the tax deed, binding upon the complainant? To foreclose upon a tax deed, section 506 of the Code provides, that the purchaser may, at any time after six months from the day of sale, file his petition in the district court, as in the case of a foreclosure of a mortgage. To foreclose upon a mortgage, section 2073 provides, that the notice must be served on the mortgagor, and upon all persons having recorded liens upon the property, which are paramount to the mortgage, or they will not be bound by the proceedings. Neither the mortgagees, nor their assignee, were made parties to the suit of foreclosure upon the tax deed. No notice of the pendency of the suit, was ever served upon them. Their liens were paramount to the lien of Abel for the taxes, and notice not having been served upon them, they are not bound, nor in any manner affected by the decree. Independent of an express statute requiring it, the authority is clear, that in order to cut off the prior recorded lien of a party, he must be made defendant, and have notice of the pendency of the suit. 2 Hill. on Mort., 82; *Adams v. Paynter*, 1 Cal., 530; *Milroy v. Stockwell*, 1 Smith, (Ia.,) 19. And in a late case, *Veach v. Schoup*, 3 Iowa, 194, this court has decided, that a person having a recorded lien upon the property, whether paramount or not, must be made party to the suit to foreclose, or he is not affected by the proceedings. The decree, if regular, therefore, is binding upon Heyne, but not upon his creditor, Bleidorn, who had a recorded mortgage upon the land.

Heyne having sold and conveyed to Shroeder, whose deed was recorded October 10, 1849, the assessment should have been made in his name. The assessment and sale of

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the land, being in the wrong name, the sale is void. The Code, (page 84,) requires the land to be listed, and consequently sold, in the name of the owner, if known; and if not known, then as unknown. But where a person has his title of record, there is no excuse for the assessor, listing it either as unknown, or in the name of the wrong party. If in the name of the wrong party, as in this instance, the sale is void, and under it no foreclosure can be had. *Combs v. Warren*, 34 Maine, 89; *Yancey v. Hopkins*, 1 Munf., 419; *Martin v. Mansfield*, 3 Mass., 419; *Johnson v. McIntire*, 1 Bibb., 295; *Cardigan v. Page*, 6 N. Hamp., 182; *Nelson v. Pierce*, Ib., 194; *Ainsworth v. Dean*, 1 Foster, 400; *Merritt v. Thompson*, 13 Ill., 716.

At most, the purchaser can now claim under his decree only the interest which Heyne had in the land, at the time of the tax sale. In *Dyer v. Branch Bank of Mobile*, 14 Ala., 622, Chief Justice Collier remarks: "It is clear that a purchaser at a sale under judicial process, for the payment of taxes, purchases the interest of the party whose property is sold, and not the independent and superior, or ultimate, title of a third person." The same is substantially decided in *Neiswanger v. Guynne*, 13 Ohio, 74, and *Dixon v. Doe*, 23 Miss., 84, goes farther even upon this point, than we desire to have it. Apply the foregoing decisions to this case, and give to the tax purchaser all the interest which Heyne had in the land, at the time of the sale and foreclosure. He had no interest whatever—had conveyed the same years before to Shroeder. From this, we conclude, that the Abels are here defending without the shadow of a title. This being the case, will they be permitted to defeat our recovery, by saying that we have not sufficiently shown that Bleidorn is the legal holder of the mortgages, and that they have never been assigned from Bell and Hull to him? Shall they, with no interest whatever in the premises, be permitted to controvert the amount we are to recover, after default is made by the mortgagor, and judgment is confessed by his grantee, the legal owner of the land?

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Clarke & Henley, for the Abels, made the following points :

First. The mortgages and notes having been assigned to the complainant, by a party professing to be an attorney of the holders, the assignments could not legally be offered in evidence, without some evidence of authority on the part of the attorney, to make said assignments. The answer sufficiently denies the assignment under oath, and calls for proof, but even if it did not, where an assignment purports to have been made by an attorney, there must be some evidence of his authority. There being no such evidence, the court erred, in admitting the mortgages and notes in evidence.

Second. The court properly rejected the letters of attorney to Wetmore. They could not be admitted without some evidence of their execution. The objections taken, are those which the law points out.

Third. The deed from Heyne and wife to Shroeder, was improperly admitted in evidence. It was not acknowledged as required by the law then in force, and as against us, was no evidence of title, or notice of title. The certificate does not show that the grantors were personally known to the officer taking the acknowledgment, or state how they were known to him.

Fourth. The tax deeds of 1848 and 1849, supported by the judgment of the district court, establish an independent title in the Abels. The law made the tax deeds *prima facie* evidence of the regularity of the proceedings to sell for taxes, and threw the burden of proof, to impeach the sale, on the complainant. He offered no evidence, to that point, and consequently, the proceedings are presumed to have been regular.

Fifth. The deed from Heyne and wife to Shroeder, not having been acknowledged as required by statute, was invalid as against us, and conveyed no title. The proceedings to foreclose the equity of redemption for the taxes of 1850 and 1851, was, therefore, properly commenced against Heyne, and a decree rendered against him.

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STOCKTON, J.—This appeal properly brings up for our consideration the matters in dispute between the complainant, Bleidorn, and the Abels, and not those in dispute between complainant and the defendants, Heyne and Schroeder. Heyne made no appearance or defence to the action, and complainant was entitled to a judgment by default against him. Schroeder entered his appearance by attorney, and, so far as he was concerned, confessed the justice of complainant's claim. How far the complainant may have been entitled to represent the mortgagees, Bell and Hull, in their claims upon the land; and how far the Abels were entitled to require that the claims of complainant, as the assignee of the mortgagees, Bell and Hull, so far as they were hostile to their own, should be made out by sufficient testimony, will be noticed in another part of this opinion.

1. The questions arising upon the demurrer of complainant to the answer of the Abels, are the same as those involved in the judgment of the court upon the final hearing. We shall consider these questions but once, as they all involve the sufficiency of the title to the land set up by the Abels, under the purchase at the sale for taxes, and the several conveyances made by virtue thereof. This sale was made by the treasurer of Johnson county, on the 19th of April, 1852, and the first deed relied on by defendants, is that made under it, for the taxes of 1848. In support of this deed, the defendants introduced a transcript of the judgment of the district court of Johnson county, at the March term, 1852, in favor of the state of Iowa, for the sale, as the law directs, of the lands returned delinquent, for the taxes of the years 1847 and 1848, including the lands in controversy. No return is shown, however, of any sale of the lands by the treasurer under this judgment; nor does the deed show that it was made under a sale held by virtue of the judgment, or of any judicial proceedings had against the land. All that is shown is a certificate by the treasurer, to the effect that on the 19th of April, 1852, the defendant, Abel, purchased

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the lands in dispute, for \$22 94, the amount of delinquent taxes for the year 1848; that in two years, if not redeemed, he would be entitled to a deed; and that on the 26th of July, 1854, the lands not being redeemed, they were conveyed by the treasurer according to the certificate.

The deed is not assisted by the judgment, because no connection between the two is shown. It stands by itself. At the time of the sale, the act of February 27, 1847, (Session Acts, 136,) had been repealed by the Code, section 28. It was repealed without any saving of the remedies existing at the time, for the collection of taxes levied and delinquent; and there was no authority under the Code, for selling, in 1852, lands delinquent for the taxes 1848. We are, therefore, of the opinion that the treasurer's deed, under the sale made for the taxes of 1848, conveyed no title to defendants, and they were not entitled to give the same in evidence.

2. The defendants rely, also, on a treasurer's deed to them for the lands, under a sale thereof for the taxes of 1849, and a similar deed, under a sale for the taxes of 1850. The sale was made in each case, on the 19th of April, 1852; not by virtue of any judgment against the lands for taxes, under the act of February 27, 1847. No such judgment, at any rate, is produced. But, whether made under the act of 1847, or under the Code, the objections to the deeds are equally valid. Under the act of 1847, the sale could only take place in pursuance of a judgment in the district court, against the land, for taxes due and unpaid. Such judgment could only be rendered upon a return of the treasurer, showing that the taxes had remained due and unpaid for the term of two years from the first day of January, next after the delinquent list had been filed in his office. Section 44, 142, acts 1847. This list, the treasurer was required to make out and file, as soon as possible after the first day of January in each year. Section 41, 141. In a regular course of proceedings, there could rightfully have been no judgment against, or sale of, the lands, in 1852, for the unpaid taxes of 1849 and 1850.

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Such has been the decision of this court upon a tax title derived under the act of 1844, the provisions of which are, in all respects, similar to the act of 1847, with the exception that, under the latter, the owner was allowed two years, from the day of sale, to redeem the land; and if not redeemed within that time, the purchaser was entitled to a deed. *Scott v. Babcock*, 3 G. Greene, 188; *Williams v. Gleason*, 5 Iowa, 284. These remarks are made upon the assumption that the act of 1847, was in force at the time of the sale. We are of opinion, however, that it was repealed by the Code, without any saving clause, and without any provision remaining to authorize a judgment against, or sale of, the lands, for the unpaid taxes of any year prior to its repeal. Nor does the sale derive any support from the provisions of the Code. Under section 496, the treasurer was authorized to sell, in each year, only the lands upon which the taxes levied the preceding year remained unpaid. No authority to sell for the unpaid taxes of any year prior to 1851, was vested in the treasurer, until the passage of the act of January 22, 1853. Session Acts, 129.

The defendants, Abels, in order further to maintain their right to the lands, gave in evidence a deed from the treasurer, under a sale of the lands for the taxes of 1851. This deed, the statute provides, conveys the title of the land to the purchaser, and is presumptive evidence of the regularity of all prior proceedings. Code, section 503. The objections taken to this deed by complainant, that the sale under which it was made, was for the taxes of 1849 and 1850, as well as the tax of 1851, and that three several tracts of land were sold in gross, instead of being sold in parcels, as required by law, we do not at present consider.

In addition to the deed, the defendants have given in evidence, and rely upon, a decree of the district court of Johnson county, rendered at the November term, 1853, in a suit brought by them upon this deed, against John F. Heyne, their co-defendant, to foreclose the right of said Heyne to this land. By this decree, it was adjudged that

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“the equity of redemption to the land, be forever barred and foreclosed against the said Heyne and all persons claiming under him.” Without undertaking to decide what effect must be given to the decree and proceedings in this suit, nor whether the objections taken by the complainant to the deed, are proper for our consideration, after the rendition of this decree, we think the objections urged to the conclusive effect of the decree upon the rights of complainant, are legitimate and valid. The proceedings in the foreclosure suit, were against Heyne alone. They bind, therefore, only the interest of Heyne, and not the interest of any person claiming a title to, or lien upon, the lands, previous to the tax sale, not a party to the suit. Now, the interest of complainant, if he shows himself the holder, in good faith, of the promissory notes secured by the mortgages, dates as far back as 1846. The proceedings in the foreclosure suit, were commenced in 1835. The complainant not having been made a party to that suit, is not bound by the decree, and his claim to the premises, under the mortgages, is in no manner affected by it.

Where the prior proceedings have been regular, the purchaser at the tax sale, acquires the lien of the tax upon the land. Code, section 503. This lien is in the nature of a mortgage, and the holder of the deed may institute a suit of foreclosure upon it, to bar the equity of redemption to the land. As in other cases of foreclosure of a mortgage, all incumbrances, whether prior or subsequent, not made parties, are not bound by the decree. *Veach v. Scharp et al.*, 3 Iowa, 194; Story Eq. Pl., section 193.

The questions relating to the proof of the assignment of the notes, and to the sufficiency of the certificates of acknowledgment of the power of attorney to Wetmore, and the deed to Schroeder, we have not deemed it necessary to consider. The ruling of the court upon these questions, was in favor of the complainant. Upon this ruling, he was entitled to a judgment against Heyne for the amount of the notes, and to a decree of foreclosure against the interest of Heyne and Schroeder, in the mortgaged premises.

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As the final decree was against the complainant, dismissing his bill, we conclude that the district court was of opinion that the defendants, the Abels, by virtue of their tax deeds, acquired a title to the land, superior to that of complainant, or those under whom he claimed. This judgment of the court dismissing the bill, based as it was on the adjudged paramount nature of the title of the Abels, was erroneous, and the same will be reversed, and the cause remanded for trial anew in the district court.

As the conclusive effect of the decree of foreclosure, obtained by the Abels on their tax deed, depends upon the question of complainant's right to the promissory notes, as the assignee of Bell and Hull, and upon the fact whether or not he was a prior incumbrancer upon the land, the defendants, the Abels, should have an opportunity of making every objection to the right of complainant to recover against Heyne, which, considering the position they occupy, and the relation they sustain to the other defendants, they are in justice entitled to make. As complainant has made them parties to the suit, they are entitled to demand that plaintiff makes out his right to a decree against Heyne, by sufficient testimony. Upon the admissibility of the testimony offered, and upon the question of its sufficiency to authorize a recovery in the name of complainant against Heyne, we give no opinion.

Decree reversed.

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Where a husband and wife mortgage a homestead to secure the payment of a partnership debt, of which firm the husband is a member, and subsequently to the execution of the mortgage, the said firm makes an assignment for the benefit of their creditors, the mortgagee is entitled to a *pro rata* share of the proceeds of the assets of the partnership in the hands of the assignee, and the homestead is only liable for the deficiency.

The mortgaging of the homestead by a husband and wife, to secure a

6	19
81	309
6	19
104	409
6	19
108	221

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partnership debt—the husband being a member of the co-partnership—and which co-partnership subsequently to the execution of the mortgage, makes an assignment for the benefit of creditors, does not give to the other creditors of the partnership, a right to make liable to their debts the homestead so mortgaged; nor does the *bona fide* release of the mortgaged premises by the mortgagee, and his receipt of a *pro rata* share of the proceeds of the partnership assets, entitle the other partnership creditors, to be subrogated to the rights of the mortgagee under the mortgage.

The rule, that where a creditor has two funds out of which he may make his debt, he may be required to resort to that fund upon which another creditor has no lien, will never be applied, unless it can be done without injustice to the creditors, or other party in interest, having a title to the double fund, and also without injustice to the common debtor.

In order to give a creditor the right to marshal assets or securities, it must appear that such assets or securities were liable to the general debts of the debtor.

Where parties to a suit in equity, and especially the complainant, give to the property in controversy the name of the homestead, and treat it as such, by which its character is clearly shown, it is not necessary for the respondents, to aver or allege that it was actually used as a home.

On the first of March, 1856, C. & D. were doing business as a mercantile firm, and on the 6th of that month, executed their notes to the complainants, for goods sold and delivered. On the first of April, 1856, C. & D. were indebted to J. W. & Co. in the sum of \$2,800, and to secure the same, executed to them, a mortgage on certain town lots, the homestead of the said partners, which mortgage was signed by the said C. & D. and their wives. On the 18th day of May, in the same year, C. & D. failed, and made an assignment for the benefit of their creditors to K. & B. On the 22d of July following, J. W. & Co., in consideration of one dollar, released the said premises from the operation of the said mortgage, and presented their said claim to the assignees, who received and allowed the same, as valid and subsisting against C. & D., and the property in their hands. The property mortgaged to J. W. & Co. was sufficient to pay their debt, and was not included in the assignment. The assignees having declared their intention to pay the said J. W. & Co., from the assets in their hands, the same per centum as all the other creditors, a portion of the creditors filed their bill, asking that J. W. & Co. shall either abide by their mortgage, and exhaust the security thus given to them, or that they shall be compelled to assign all securities in their hands, for the benefit of all the creditors, and that if said security is sufficient to pay the debt of J. W. & Co., they be compelled to resort to that, and enjoined from receiving any of the proceeds of the property in the hands of the assignees—which bill was dismissed; *Held*, That the bill was properly dismissed.

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Appeal from the Mahaska District Court.

SATURDAY, APRIL 10.

IN CHANCERY. The cause was heard on bill and answer, which show the facts to be briefly as follows: On the first of March, 1856, Lot A. Chorn and Isaac Dickerson, were doing business as a mercantile firm, in the city of Oskaloosa, and on the 6th of that month, made their notes to complainants for goods sold and delivered. On the 18th of May of that year, Chorn and Dickerson failed, and made an assignment for the benefit of creditors, to Kinsman & Bressler. The form or legal sufficiency of the assignment is not objected to, but petitioners complain of the action of certain creditors. It seems that complainants duly proved before the trustees their claims, and the same were duly allowed, and that the property is not sufficient to pay all the debts. On the first of April, 1856, Chorn & Dickerson were indebted to John White & Co., in about the sum of \$2800, and to secure the same, executed to them a mortgage on certain lots in Oskaloosa, the homestead of the said partners, which mortgage was signed by the said Chorn and Dickerson, and by each of their wives. On the 22d of July, 1856, White & Co., in consideration of one dollar, released said property from the operation of said mortgage, and presented their said claim to the trustees, who received and allowed the same, as valid and subsisting, against said Chorn & Dickerson, and the property in their hands. The property so mortgaged, is sufficient in value to pay the debt of said White & Co., and is not included in the assignment. The trustees having declared their intention to pay the said White & Co., from the assets in their hands, the same per cent. as all the other creditors, the complainants file this bill, asking that said White & Co. shall either abide by their mortgage, and exhaust the security thereby given to them, or that they shall be compelled to assign all securities in their hands, for the benefit of all the creditors; and that if said security is sufficient

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to pay their demand, that they be compelled to resort to that, and be enjoined from receiving or taking any of the proceeds of the property in the hands of the trustees. Upon these facts, the court below dismissed the bill, and complainants appeal.

Wm. H. SeEVERS and *Crookham & Fisher*, for the appellants.

The complainants claim that it is well settled, that where a party has a lien on two funds, and another party has a junior lien upon but one of those funds, the former will in equity, be first compelled to exhaust that fund on which the latter has no lien. 1 Story Eq. Jur., sections 562, 563, 564, 558, 559; *Evertson v. Booth et al*, 19 Johns., 485; *Cheeseborough et al v. Millard et al*, 1 Johns. Ch., 412; *Dorr v. Shaw*, 4 Ib., 17; *Aldrich v. Cooper*, 8 Vesey, 382; *Tummer v. Bayne*, 9 Vesey 209. The general doctrine laid down in these authorities, is not denied, nor can its applicability to this case be successfully denied.

White & Co. had a clear and undisputed lien upon the mortgaged property, and also a right to receive the amount of their debt from the proceeds, in the hands of the assignees of Chorn & Dickerson. The complainants had no lien on the mortgaged property, nor could they get any. If White & Co. are permitted to receive their proportion of the proceeds in the hands of the assignees, the amount that will be received by complainants from that source, will be much lessened; and unless they can get their pay from that quarter, they have none other to look to. Complainants claim that it sufficiently appears, that the mortgaged property was amply sufficient to pay White & Co. The petition charges that it was. Chorn, in his answer, says nothing upon the subject, and thus admits it. Dickerson admits it in express terms, and White & Co. deny that it was worth \$4000, or sufficient to pay their claim. White & Co. do not show what it was worth—set up no new matter upon this subject—and give it merely as their

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opinion. The pleadings clearly show, that Dickerson, as well as Chorn, are interested against complainants; but, viewing them as disinterested parties, does not their answer and silence upon this question sufficiently show, that the property was worth sufficient to pay White & Co.'s claim? Complainants, however, claim that it makes no difference whether the mortgaged property was sufficient or not. It cannot be claimed it was worth nothing. If it was worth anything, White & Co. ought to have exhausted it, or assigned their right in trust to complainants, or have held themselves in a situation that plaintiffs could have paid off their claim, and taken the security. By their own act, they deprived themselves of the power to do either. They had a perfect right to receipt the mortgage, but by so doing they acquired no new rights, or could they be placed in a better situation than they were before.

For a valuable consideration, White & Co. receipted and discharged the mortgage, and gave up what would have paid their debt, and yet say they recovered nothing, nor acquired any additional security for their debt; and that there is no trust, express or implied, by which they have any security, and now look alone to the estate of the insolvents for their pay, which they admit will not pay more than seventy cents to the dollar. It requires the sworn answer of White & Co., at least, to convince one that this proposition is true. The pleadings show that White & Co. are bankers—men of business—conversant with its details. That such men would do so, is past belief. If they did, no one is to blame but themselves, and they alone must suffer the consequences of their folly.

The defendants insist, that however the foregoing propositions may be, yet the decree below is right; for the reason that the property mortgaged was the homesteads of Chorn & Dickerson, and that they, Chorn & Dickerson, could compel them to first exhaust all property in which they had an interest, before selling said homesteads. This proposition is not true, for the following reasons:

1. It is not alleged that said property was used as a

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home by Chorn & Dickerson, or either of them. It is nowhere stated that they, or either of them, was the head of a family. It certainly will not be claimed that because they and their wives signed said mortgage, and afterward, on the 13th of May, 1856, signed the deed of assignment, that they were necessarily heads of families when said mortgage was released. Because they were once entitled to the homestead exemption, does not forever give them that right. It is, therefore, confidently claimed, that there is no such averment in the pleadings, as well entitle White & Co., or Chorn & Dickerson, or either of them, to claim said mortgaged property as a homestead.

2. But if there was, then complainants say that no one but Chorn & Dickerson, themselves, can set up this claim. White & Co., nor any one else, can do this for them.

3. Chorn & Dickerson, or either of them, never took any steps to enforce their right, if they had one. Up to the time of the commencement of this suit, such an exemption was unheard of. It was an after thought.

4. By the execution of the mortgage, Chorn & Dickerson and their respective wives, agreed that said property might be sold, and had thus waived their right to said property as a homestead. As between them and White & Co. there can be no question, but that White & Co. had the right to make their debt out of said property, by sale or otherwise. If White & Co., for reasons satisfactory to themselves, choose to give up this right, it is no fault of ours, nor can they be permitted now to say, that they did not possess and have that right. Chorn & Dickerson, and their respective wives, had the power to convey this property, and by the mortgage, they expressly stipulated that it was liable for the debt of White & Co. This is sufficient. Code, section 1249.

5. Complainants had the right to require, at least, that White & Co. should assign said mortgage to them, or to said Bressler & Kinsman, so that the right of Chorn & Dickerson, or either of them, to the homestead exemption might be contested. This proposition must be true. If

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White & Co. had anything, we were entitled to the benefit of it. They should have contested Chorn & Dickerson's right to the homestead exemption, or given complainants, or the assignees of Chorn & Dickerson, the right to do so. Before White & Co. were even threatened or advised, from aught that appears, that Chorn & Dickerson would make such claim, they surrendered and gave up all their claim upon said mortgaged premises. If White & Co. will assign, and have it in their power to do so, the mortgage to Bréssler & Kinsman, for the benefit of the creditors of in Chorn & Dickerson, themselves included, then one prayer of our petition is accomplished, and complainants are satisfied.

E. W. Eastman, for the appellee.

The debt, in this case, is the debt of Chorn & Dickerson. The security never was partnership property. It is not even the private property of the partners. The lots are the homestead of Lot A. Chorn and Sarah J. Chorn, and of Isaac and Olive Dickerson. These homesteads are the joint property of husband and wife, and any conveyance thereof is of no validity, unless both join in the conveyance. Code, section 1247. It is exempt from judicial sale. Code, section 1245. The homestead is, in substance, an *estate tail*; first, to the survivor, either husband or wife; and second, to the issue of either. Code, sections 1263, 1254; 2 Johns. Ch., 537. The homestead cannot be sold for any lien by mortgage or otherwise, till all the other property is exhausted, which is liable to execution, and then only to satisfy the deficiency, or balance. Code, section 1249.

"Chorn & Dickerson" are, for many purposes, a single legal person, separate from either Lot A. Chorn or Isaac Dickerson. The property of Chorn & Dickerson is, in chancery, except in case of fraud, first liable for the firm debts, while that of Lot A. Chorn, and Isaac Dickerson, is first liable for their respective private debts. Again, Lot A. Chorn may be indebted to the firm of Chorn & Dick-

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erson, while, at the same time, the firm may be indebted to Isaac Dickerson. If either of the members of the partnership pays a firm debt with his private property, the debt is not thereby extinguished, but the firm becomes liable to refund to him the amount paid. 6 Mass., 243; 1 Story's Eq., sections 675, 676, 677; 3 Kent, 65, (margin and note *a*); 6 Mass., 243; 22 Pick., 453, 454. From this fact, it must follow, that when one partner pledges his private property or individual name, to secure the payment of a firm debt, he is not in equity the original debtor, but only a security for the partnership. And though in law and equity, his private property will be liable to pay any balance due from the firm, after the firm property is exhausted, yet the partnership becomes liable to him, and the other partners become liable to contribute their share. This shows that, in equity, a partnership and the individual members of it, are treated as separate persons, and have separate rights, which equity will protect and enforce. But in this case, other persons besides the individual members of the partnership, have rights to be enforced and protected. The mortgage, in this case, is a security for the firm debt, and it must necessarily follow that the mortgagors are securities for the firm of Chorn & Dickerson. 2 Blackstone, 158; 1 Greenl. Cruise, (top,) 546.

The law of Iowa guarantees to a wife the right to hold property separate from, and jointly with, her husband. In this case, Chorn and his wife are, so to speak, partners or joint owners of a homestead. And so with Dickerson and his wife. And these two classes of joint owners have pledged their separate and private property to secure the payment of a debt of Chorn & Dickerson. Two questions here naturally arise: 1. Are those securities equally liable with Chorn & Dickerson, to pay all of those debts? or, in other words, is the debt of plaintiffs, or of John White & Co., originally, as much the debt of these sureties, as it is of Chorn & Dickerson? 2. Is there any equity existing which would require these sureties to give this property, by them mortgaged, in payment of the debt,

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if it were not mortgaged? And is there any equity whatever to require Olive Dickerson or Sarah J. Chorn to give up this property mortgaged, or any other property which they, or either of them, individually have, to pay either the debt of John White & Co. or the debt of plaintiffs?

It must be admitted that there is not. This property, then, stands exactly in the same position as though any other person had become security, and had mortgaged a farm, or a homestead, to secure the debt; for neither the persons nor the property are, in equity, liable. By marshaling of these securities, then, those sureties will, in equity and in fact, lose all that is taken from them. They will lose just as much as the plaintiffs will gain. To use a common expression, then, will a court of equity "rob Peter to pay Paul?"

Nothing is equitable assets, except what has been made subject to debts generally. 1 Story's Eq., section 552. In this case, John White & Co. have no special lien upon the assets in the hands of the assignees, over the plaintiffs, but stand on an equal footing, legally, with all the creditors, to recover a *pro rata* share; and, by the Code, they cannot resort to this mortgage, until the assets have all been exhausted. Section 1249. But courts of equity do not marshal assets, except when the creditor has a special lien on both funds, so that he could exclude the other creditor from taking a *pro rata* share, with him, of the assets. 1 Story's Eq., sections 558, 562. But when a creditor has an equitable lien, and also is a legal creditor, on an equal footing with the other creditors, courts of equity will not interfere to prevent his legal rights. They only interfere to compel that creditor to divide his legal dividend, with the other equitable creditors of the equitable fund. 1 Story's Eq., 557; Story on Partnership, 364. That would take place in reverse of this case. Suppose that Lot A. Chorn and Isaac Dickerson, and their wives, had each executed a mortgage on the homestead, to secure a private debt, contracted at the time of White's debt, and the mortgages of even date with that of John White & Co.

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Those mortgage creditors could not take of the funds of the assignment, and they could compel John White & Co. to divide their legal dividend with them, before he could take equally with them on the mortgage. That clearly establishes the right of John White & Co. to hold their equitable lien on the mortgage in this case, and also take under the assignment. But these plaintiffs have neither a legal nor equitable interest in the mortgaged property. Code, section 1249.

The plaintiffs say: "It is a general rule, that if a creditor has two funds, he shall take his satisfaction out of that fund upon which another creditor has no lien." 1 Story's Eq., section 559. "But though the rule is general, it is not to be understood without some qualifications." 1 Story's Eq., sections, 560, 642, 643, 644, 645; 17 Ves., 520. It is never applied except when it can be done without injustice to the creditor, and also without injustice to the common debtor. 1 Story's Eq., 560, 642. If courts of equity will not do injustice to a "common debtor," it certainly will not to their wives and to sureties. The proper inference from this is, that the securities will not be marshaled at all, unless the property belongs to the same common debtor. And such, in fact, is the true spirit of the law of equity. And hence, unless the debtors are all, at least, morally, (and I might safely say equitably,) entitled to both funds, the court will not marshal the securities. 1 Story's Eq., 560, 562, 634; 4 John. Ch., 19.

The security of John White & Co., in this case, is not the property of the common debtor, Chorn & Dickerson, and it is exempt, both legally and equitably, from being applied on those debts of plaintiffs and of defendants, except for the mortgage; and is, in fact, the pledge of a surety. But courts of equity will never marshal either assets or securities against a surety, but will do so in his favor. 1 Story's Eq., 499, 560, 634, 643, 644, 645. Neither will courts of equity compel a joint creditor to resort to the private fund of one of the joint debtors, so as to leave

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the joint fund larger. 1 Story's Eq., 642, 643, 644; 4 Johns. Ch., 19; 17 Ves., 520.

There is one other important consideration. There is a little difference between marshalling assets and marshalling securities. This is a case of marshalling security. The authorities relied upon by plaintiffs, are mostly cases of marshalling of assets, while we refer mostly to those of marshalling securities. It is very seldom that courts of equity marshal assets, except in case the debtor is dead, or perhaps, in some cases of bankruptcy, which is about the same in reference to property. Assets are marshalled only when it is a final end of the debt and fund. The fund, whether more or less, is all applied to all the creditors equitably, in full satisfaction of their claims, and the matter is then forever ended. 1 Story's Eq., sections 560, 261, 568, 571, 633. Securities are not marshalled, unless the persons claiming it have superior equity to the property, over the party from whom they wish to take it. 1 Story's Eq., sections 634, 634 (a.) Chorn & Dickerson are not dead. Neither does this assignment, like bankruptcy, make a final satisfaction of the debts of plaintiffs. There is no condition to the assignment, making it in satisfaction of the debts, and there is no law making it so. Hence, Chorn & Dickerson are both, jointly and severally, liable for all balances unpaid out of this assignment. And it is certain, that the plaintiffs in this case, have no superior equity to these homesteads, over the wives of Chorn & Dickerson, or even over Lot A. Chorn and Isaac Dickerson. For these reasons, it appears to me, that this injunction should be dissolved, and the bill dismissed.

WRIGHT, C. J.—The complainants, in this bill, charge that White & Co. released the mortgage with the intention, and for the purpose of defrauding the other creditors; or that, if this is not true, then, that there was some agreement between them and the mortgagors, by which they were in some manner secured, in consideration of said release. All such averments are, however, explicitly denied

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by the several answers of the respondents, and we are left to determine the rights of the parties, upon the admitted facts, which are substantially given in the statement of the case.

The property included in the mortgage, was not covered by the assignment, and was not liable to the general debts of the mortgagors. It could only be made liable for the debts stated in the petition, by a written contract, executed by the persons having the power to convey, such contract expressly stipulating that it, (the homestead,) was liable therefor. And, even in such a case, it could not be sold, except to supply the deficiency remaining, after exhausting the other property of the debtor, liable to execution. Code, section 1249. To make a valid conveyance of such homestead, the husband and wife must concur in signing the same. Section 1247.

As a starting point, therefore, we shall regard it as clear and manifest, that unless the taking of the mortgage, by White & Co., gives to the other creditors, a right to inquire into and make liable the homestead of the parties making the assignment, they could not otherwise disturb their debtors in its possession and enjoyment. They could not, because it is, by express provision of the Code, exempt from judicial sale, except when encumbered in the manner before stated. Section 1245. And it is not pretended, of course, that in case of insolvency, it is any more liable than if the owner was entirely able to pay his entire indebtedness. As to the general creditors, such property has virtually no place or existence. It belongs not alone to the husband, but is wisely set apart, by the law, for the benefit of the family, and is not to be taken from them, until both husband and wife shall die, and there shall be a failure of issue them surviving. Code, sections 1263, 45; *Floyd v. Mosier*, 1 Iowa, 512.

Does the taking of the mortgage by White & Co., change the principles which would otherwise be applicable? Is it a matter of any importance to the other creditors, that White & Co. released this mortgage, assuming that

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they have released it, in good faith, and have not taken any other or further security? We clearly think not. If White & Co. had never taken this mortgage, then, as already shown, they would stand in the same position as all other creditors, and would have the same right to their *pro rata* payments from the effects of their insolvent debtors. The right of the other creditors to inquire into the circumstances of the release, (if it was *bona fide*,) or to insist that they shall be permitted to stand in the place of the mortgagees, must, it seems to us, be claimed alone upon the hypothesis, that White & Co. have abandoned a security which is, or should be, liable for the general indebtedness, or to the creditors generally. For if such property could not be made thus liable, what matters it, whether the mortgagees did, or did not, release it. Chorn & Dickerson, and their wives, might, at their option, execute a mortgage upon their homesteads, to any creditor, but it would by no means follow, that every other creditor, by that act, would acquire a right to subject it to the payment of his or their debts. The extent of the incumbrance, in such a case, would be to secure the particular debt named, and the clear policy and spirit of the law would be defeated, if it could be made thereby liable beyond the limitation thus fixed, or if the general creditors could claim to be subrogated to the rights of the mortgagees.

We understand the position of White & Co., and their relation to the property so mortgaged, to be this: In the first place, they were creditors of the firm of Chorn & Dickerson, in the same manner as the complainants. Beyond their general right to claim payment out of the general property, or that liable to judicial sale, they procured a lien upon property declared by law to be exempt from execution, which property was not, however, and could not be, except by the concurrence of the owners, subject to the general debts; neither could it be sold, even under the mortgage, until all other property liable to execution was exhausted. Now, suppose they had not released their lien, would they not have been compelled to exhaust all other

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means to obtain payment, before resorting to their mortgage? And if so, had they not a right, and would it not have been their duty, to present their claim to the trustees, under the assignment, and take their proportion of the money arising from the effects in their hands? Could not Chorn & Dickerson, if foreclosure proceedings had been commenced, have compelled the mortgagees to first resort to the other funds, and insisted that their homesteads were only liable, under the law, for any deficiency remaining after exhausting the other property? And if so, could the other creditors claim that, inasmuch as the allowance of the demand of White & Co., and its payment *pro rata*, had lessened the amount which they would otherwise have received, therefore, they must be compensated, by being let into their rights under the mortgage? It seems to us not; but that the mortgage was exclusively a transaction between the immediate parties to it, and that the other creditors could in no event claim any advantage or benefit from it. And the release can in no manner change the rights of the respective creditors. White & Co. had a perfect right to execute such a release. As they would have a right to have their demand paid *pro rata*, while the mortgage remained in full force, so they would after the release. The release was for the benefit of the mortgagors, and upon no fair and legitimate ground could it inure to the other creditors.

This is not a case where a party has a right to marshal assets or securities. It is true that the general rule is, that if a creditor has two funds out of which he may make his debt, he may be required to resort to that fund upon which another creditor has no lien. Story's Eq. Jur., section 559. And yet we are not to take this rule without some qualifications. For instance, it is never applied, unless it can be done without injustice to the creditors, or other party in interest, having a title to the double fund, and also without injustice to the common debtor. *Ib.*, sections 560, 642.

Apply the general rule, without the qualification, to the

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case at bar, and how does it stand. To compel White & Co. to resort their mortgage, they must have been in a situation to make their debt out of the property so mortgaged. But how can such a rule possibly have any application, when the law expressly provides, that they shall not resort to this fund, or shall not enforce this lien, until they have exhausted the other property. If it was a mortgage upon other property, not thus exempt, then the rule might be applied; but certainly not, where the law expressly inhibits them from enforcing their lien, except upon a contingency that could not occur, while there were any assets liable to the payment of their debts. In a word, the difficulty in the whole argument of complainants, is, that it assumes that the homestead, as well as all the other property, ought, by reason of the mortgage, to be thrown into the common fund, and that they, by that act of their debtor, have acquired some right to control the disposition of the mortgage; whereas, to our minds, it is a matter of entire indifference, whether the mortgage was, or was not, given—was or was not released. For, if given, and released, or not released, the property would still be as completely beyond their control, or beyond any right of theirs to interfere with its management, as if it had remained unincumbered. If, by possibility, it could be made liable to their debts, as a part of the common fund, they might complain. But it can work no prejudice to them, nor is it inequitable or unjust, to hold that White & Co. may release, at their option, a mortgage upon property which the common creditors could never, under any circumstances, reach.

And if we apply the further thought, that the general rule is not to be applied, when it will work injustice to the common debtor, the argument, we think, becomes conclusive. The law gives to these debtors, the right to claim this property as exempt, and sets it apart for the benefit of their families. By the concurrence of those who may convey it, it may be incumbered. But, by compelling White & Co. to resort, in the first instance, to their mortgage, or by subrogating the other creditors to their rights,

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we would defeat the plain policy of the law, and work most manifest injustice to the common debtors. By one act, and in a particular manner, they subjected the exempted property to the payment of a particular debt, but not until all their other property was exhausted. Now, can it be taken from them, after they have succeeded in releasing this incumbrance, and in a manner unknown to the law, and in direct violation of their rights, and the spirit, policy, and letter of the Code?

But, finally, it is urged that there is nothing to show that the premises named in the mortgage, are used as a home by the debtors; and that until this is shown, they are not the homestead, and, therefore, not exempt. The bill charges, however, expressly, that the property so mortgaged was the homestead, and used as a residence by the respective mortgagors. The answers also set up and assert the same fact. Indeed, that the property mortgaged was exempt, as a homestead, or the homesteads of the two members of the firm of Chorn & Dickerson, is an admitted and conceded fact throughout all the pleadings. And if the parties, (and especially the complainants,) have treated the property thus, and given it this name, by which its character is clearly and conclusively shown, it is not necessary for the respondents to aver or allege that it was actually used as a home. If it was the homestead, then, of course, it must have been so used, to give it that character.

Decree affirmed.

CHADWICK v. MILLER.

Where evidence is offered to a jury, the cause argued, and the jury are about to retire to consider of their verdict, a court possesses no power to non-suit a plaintiff; and where such a motion is made by the plaintiff, and sustained by the court, the legal effect of the proceeding is, that the plaintiff voluntarily takes the non-suit.

After a judgment of non-suit against a plaintiff in replevin, on his own

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motion, it is proper for the court to award a return of the property replevied to the defendant.

In replevin, the plaintiff takes the property from the possession of another, under a claim of right to either the possession, or the property itself, or to both; and it follows, as of course, that if he fails to establish the right set up, the property should be returned to him from whom it was taken.

Appeal from the Jones District Court.

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Chadwick replevied two horses from the possession of Miller. The record states that a jury was impaneled and sworn; the evidence of both parties was adduced; the cause was argued; the court instructed the jury; and a bailiff was sworn to take charge of them. At this point of the case, the plaintiff "moved the court to direct a non-suit, for the reason, (as the record states,) that the matters given in evidence by the plaintiff, do not support the case as set forth in his declaration." The record entry proceeds to state, that thereupon the court "do order that the plaintiff be so non-suited. Whereupon the jury are discharged from further consideration of the premises. Thereupon it is considered, that the defendant go hence without day, and recover of the plaintiff his costs, &c. And the court do find that the right of the property in dispute, is in the defendant, and a return of said property is awarded him by the court." The plaintiff appeals.

Henry & McCarn, for the appellant.

The record shows that the issue joined by the parties to this suit, was not submitted to, and passed upon by the jury, but that the plaintiff withdrew his action, and submitted to a non-suit. This he had the right to do, and withhold from the court the power of adjudicating and passing upon it. The court, however, proceeded to make an order for the return of the property replevied to

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the defendant, in which he recites, that the title to said property is found to be in the defendant. This order is *coram non judice*. The only power possessed by the court, after the plaintiff had submitted to a non-suit, was to enter up judgment for costs, leaving the defendant to his remedy over against the plaintiff on his bond. A plaintiff in replevin may discontinue his suit at any time, either in vacation, by application to the clerk, or in term time, by application to the court; and in either event, the court cannot make an order for the return of the property. And if the court were to make such an order, (as in this case,) there is no power whatever inherent in the Court, under the Code, to enforce obedience to such an order.

The action of replevin, as it existed at common law, was principally used in cases of distress, but it seems that it may have been brought in any case where the owner had goods taken from him by another, and was of two sorts, *detinet* or *detinuit*; the former, where goods were detained by the person who took them, to recover the value thereof and damages. The latter, when the goods had been delivered to the party. And in either form, the plaintiff was entitled to maintain the suit, if he had, at the time of the caption, either the general property in the goods taken, or a special property therein. But under our Code, the common law has been so modified, as to extend this form of action to all cases in which property is wrongfully detained, and to which the plaintiff has the right to the immediate possession. The right to the possession is the gravamen of the action, and not the right of property; for the right of property may be in the defendant, while, at the same time, the plaintiff might be entitled to the right of possession, and have his remedy in this form of action. It has not, by any means, been the practice in our courts, where the plaintiff brings replevin, and fails in his suit, to order a return of the property. See 2 Greenleaf, 90.

The action of replevin is *sui generis*, and must be governed by the rules best calculated to carry out the object

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of the law. The title to the property was in no manner settled by the non-suit; and this being the fact, the court could make no order for the return of the property to the defendant. This would be justice, and I know of no authority or law against it. 3 Gil. & Johns., 247; 1 G. Greene, 24.

It has been held in the state of Ohio, under the statute of that state, regulating actions of replevin, that a plaintiff may appeal from a voluntary judgment of non-suit, in an action of replevin. The action is of a peculiar character; the defendant had a right after the non-suit, to impanel a jury to assess his damages, in which issue the right of property is determined. *Reed v. Carpenter*, 2 Ohio, 79.

Under our Code, there is no provision made for the defendant recovering damages in the action of replevin, where the plaintiff fails in his suit, or where he submits to a non-suit, or is non-suited. He is left wholly to his remedy on the bond. And if the court, when the plaintiff is non-suited, does not possess the power to impanel a jury in order to inquire into the defendant's damages, and the right of property in the defendant, then they do not possess the power to order a return of the property replevied to defendant. And, finally, a court can only render a judgment for money, and have no power to render a judgment, in any form, for property.

Joseph Mann, for the appellee.

The only question arising in this case, is whether the court below had the right to award the return of the property replevied or not. The plaintiff in error claims, that the court only had the power of rendering judgment for costs, leaving the defendant to his remedy against the plaintiff alone on his bond.

All the decisions and authority cited by the counsel of the plaintiff, were made under entirely different statutes from that of the Code of Iowa, and, therefore, are not applicable to this case. I think the conditions of the replevin

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bond, as set forth in the Code, (section 1996,) clearly contemplates that an award of the return of the property should be awarded, where the plaintiff either fails to establish his right to the property, or voluntarily submits to a non-suit. While I am ready to admit, that the court did not possess the power to assess the damages of the defendant, and render judgment for the value of the property, I contend it was right and proper for the court to award the return of the property, in order that the defendant might be restored to the *prima facie* possession of the property, and thereby have the same presumptive evidence of ownership he had at the time of the commencement of the suit.

The plaintiffs having withdrawn a juror, and submitted to a non-suit, was conclusive evidence of the fact that he had failed to show himself entitled to the property, and that he had no right to retain it. He had commenced his suit improvidently, and was liable to restore the property whence he had replevied it. It is no just ground of complaint on his part, that a return of the property was ordered to the defendant. 14 Ill., 385.

WOODWARD, J.—If the plaintiff seeks to draw an argument from the fact, that the record entry states that the court ordered that the plaintiff be non-suited, this will fail him; for, all of the record being taken together, it shows that the order was made upon his motion; and it is manifest that it was, in effect, a voluntary non-suit. He seeks to make it appear that the court compelled the non-suit, whilst in fact the legal effect of the proceeding can be none other than that of the party voluntarily taking the non-suit, which he had the power to do, up to that precise point, in the course of the trial.

The record entry of the finding of the court, that the right of property was in the defendant, has no weight in the determination of the question before us, for that being unnecessary and unauthorized, has no legal force.

The only question for this court to answer, is, whether the judgment below should award a return of the proper-

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ty; and the answer is, that the judgment is correct in this respect. At the common law, judgment for the defendant was for a return, and his damages and costs. 1 Sel. N. P., 378, 379; 1 Chit. Pl., 162; *Smith v. Aurd*, 10 S. & R., 92; *Philips v. Harris*, 3 J. J. Mar., 121. The nature of the case, also, dictates such a judgment. In replevin, the plaintiff takes the property from the possession of another, under a claim of right to either the possession or the property itself; that is, the title or ownership—or to both of these; and it follows, as of course, that, if he fails to establish the right set up, the property should be returned to him from whom it was taken; and the condition of the bond to be given by the plaintiff, under section 1996, Code, contemplates a judgment of this kind.

The plaintiff misconceives, probably from regarding the statute provisions as the whole of the law of replevin, whilst, in truth, the body and substance of it lies in the common law, and the statute contains a few special provisions only, upon the subject, which are to be understood with a reference to the common law.

The judgment of the district court is affirmed.

VREDENBURGH v. SNYDER.

Where the transcript of a record does not disclose the evidence in the court below, the appellate court is bound to presume that the evidence was sufficient to authorize the judgment.

In *scire facias* on a judgment, the judgment on its face, imports absolute verity, and cannot be impeached by any matter going behind it; but the defendant may plead matters arising subsequent to the rendition of the judgment sought to be revived.

Where a judgment is joint, and one of the defendants is dead, the plaintiff may revive the judgment against the other defendant, without making the personal representatives of the deceased debtor, a party to the proceedings in *scire facias*.

In *scire facias* against one of two joint judgment debtors, the other being dead, the failure of the plaintiff to present his claim against the estate of the deceased debtor, and have the same allowed—the estate being simply

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sufficient for the payment of debts, is no sufficient cause against the issuing of execution on the judgment, against the surviving debtor.

The owner of a joint judgment against a principal and surety, the principal debtor having died since the rendition of the judgment, is not required to present his claim against the estate of the deceased, and have the same allowed, in order to preserve his remedy against the surety.

No damages are recoverable in *scire facias*, for delay of execution. The plaintiff recovers costs, but no damages.

In *scire facias*, the judgment should be that the plaintiff have execution for the judgment described in the *scire facias*, and his costs.

Appeal from the Johnson District Court.

SATURDAY, APRIL 10.

On the 5th of September, 1845, the plaintiff recovered judgment in the Johnson district court, against the defendant, and one William B. Snyder, for the sum of about one hundred and twenty dollars. In February, 1857, he filed his petition to revive said judgment, and obtain execution against the defendant—averring that in December, 1845, the said William B. Snyder departed this life. The petition is accompanied by the affidavit of the attorney of the plaintiff, to the effect that the judgment had not been satisfied, and specifying the amount still due thereon.

The defendant answered, admitting the rendition of the judgment, and admitting, as stated in the petition, that it had been satisfied in part—but he further says, that he “is not informed, and that it is impossible for him to ascertain, by any means within his power, or under his control, how much, if anything, is yet due upon said judgment, and calls for proof.” He then proceeds to state, that his co-defendant in said judgment, at the time of his death, left a large amount of property, and more than sufficient to satisfy his debts; that soon after his death, administration was granted upon his estate; that it was duly administered, and all debts and claims presented, and allowed, were

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fully paid and satisfied, leaving a large amount of property still belonging to said estate, and more than would be required to pay this judgment—of all which plaintiff had notice. He also avers, that said estate was legally bound to pay all of said judgment; that defendant was surety for the said decedent, upon the debt for which the judgment was rendered; that the plaintiff negligently suffered full administration to be made, of the property of the deceased, and did not file and prove said judgment; and that said claim, by reason of plaintiff's negligence, is forever barred, and cannot be recovered against said estate, "whereby the said plaintiff hath discharged the said estate, as well as this defendant, from further liability on said judgment." The answer calls for a reply under oath.

To so much of said answer as relates to the administration upon the estate, and the release of defendant, there was a demurrer, which was sustained. Defendant made no amendment, nor was there any replication, or further pleading. The cause being heard on "the issue joined, it was ordered, that plaintiff recover of defendant, the amount of said judgment, (less a payment admitted in the petition), with interest; and that execution issue therefor, and for costs. Defendant appeals.

J. D. Templin & Co., for the appellant.

Clark & Brother, for the appellee.

WRIGHT, C. J.—Several objections are urged against the correctness of this proceeding. And first, it is insisted that upon the petition and answer, the judgment should have been for the defendant; and under this position, it is claimed that plaintiff should have replied under oath; that there was no replication, and that, therefore, the answer was to be taken as true. It will be seen, however, that after the demurrer was sustained to a portion of the answer, there was nothing left requiring a replication. So much of the answer as still remained, did not deny, or

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take issue, upon any part of the petition. It is true, that defendant avers ignorance as to the amount due on said judgment, but upon this, there could be no issue, further than was already presented in the petition. The cause was heard, but upon what evidence does not appear, and we are bound to presume, that the proof for which defendant called, on this subject, was made to the satisfaction of the court, and was sufficient to authorize the judgment.

The Code provides, that after the lapse of five years, an execution can only issue after suing out a *scire facias*, and obtaining the requisite order of the court thereon. Section 1887. By Mr. Bouvier, *scire facias* is defined to be a judicial writ, founded upon some record, and requiring the defendant to *show cause* why the plaintiff should not have the benefit of such record. 2 Law Dictionary, 499. Again, it is defined as a judicial writ, and founded on matter of record, as judgments, recognizances, and letters patent, on which it lies to enforce the execution of them, or to vacate, or set them aside. 7 Bacon's Abridgement, 128. And the same author states, that though a judicial writ, yet it is so far in the nature of an original action, that the defendant may plead to it. The writ being founded upon some record, and in this case upon a judgment, the principle is well settled, that the judgment on its face imports absolute verity, and cannot be impeached by any matter going behind it. *Duncan, Adm'r, v. Hargrave et al.*, 22 Alabama, 150; *Miller v. Shackelford*, 16 Ib., 95; Tidd's Practice, 1046. But there is no doubt but that he can plead matters arising subsequent to the rendition of the judgment sought to be revived. And the defendant, having thus plead he presents now for our consideration, substantially, these questions:

First. Could the plaintiff revive his judgment against the defendant, as the survivor, without making the personal representatives of William B. Snyder also a party? Without determining whether the plaintiff might not have proceeded against the personal representatives,

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alone, or whether he might not have united them with the survivor, we conclude that he might elect to proceed against the defendant, without uniting those representing his co-defendant. The practice is not uniform in different States, but we think this conclusion is justified from an examination of the following, among other authorities: *Green v. State Bank*, 5 Eng. 456; *Finn, as Adm'r v. Crabtree, as Adm'r*, 7 Ib.; Tidd's Practice, 1028; *Bolinger v. Fowler et al.*, 14 Ark., 27; *Storer v. Stroman*, 9 Watts & Serg., 85; *Morton v. Croghan*, 20 Johns., 106. In the case before us, it will be observed, that the judgment is personal, and the death of the co-defendant is recited in the petition and writ.

In the second place, we inquire, whether the failure of the defendant to present his claim against the estate of William B. Snyder, and have the same allowed, will relieve the plaintiff from the payment of the judgment, by reason of anything set up in the answer. We are of the opinion that he was not bound thus to present his demand, and that defendant cannot avoid the payment of the judgment, admitting the truth of the averments contained in his answer. One reason for this conclusion is, perhaps, sufficient. There is no averment or pretence, that the failure of plaintiff to present his claim against the estate, was the result of any agreement, contract, or understanding, with or without consideration, between him and the administrator. Neither is it charged that there was fraud or collusion in failing to demand payment of William B. Snyder. In substance, the answer does nothing more than state, that plaintiff did not press the collection of his debt against the principal. He was not bound to do so, in order to preserve his remedy against the surety. If the note had never been merged in the judgment, it would be no defence that the plaintiff had not sued the principal. If the surety desired to avoid his liability, upon any such ground, he could have required the plaintiff to sue, or permit him to sue; and had the latter refused or neglected to do so for ten days, he might have been discharged. Code, sec-

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tions 970, 1, 2, and 3. And after judgment, such duty, in order to avoid liability, would certainly be much more imperative. And thus, we see, that there was something for the defendant to do, and that the mere failure to present the demand, would not prevent the plaintiff from reviving his judgment. We conclude, therefore, that the demurrer was properly sustained to the answer. And this conclusion we arrive at, without considering whether the defendant could, after judgment, show that he was surety; and without determining what, under other circumstances, might be the consequences resulting from a failure to collect the debt from the estate of the principal.

Finally, it is urged that no judgment should have been entered, but an order to revive the judgment, and for execution. This objection, we think, is well taken. No damages are recoverable in *scire facias*, for delay of execution; and it was not until the statute 8 & 9 W. III. c. 11, section 3, that the plaintiff was entitled to costs. Under our practice, the plaintiff recovers costs, but no damages. As already stated, it is a judicial writ, founded upon some record, requiring the defendant to *show cause*, &c. But no new judgment should be entered, but the entry should be that the plaintiff have execution for the judgment mentioned in the *scire facias*, and for costs. *Murray's Adm'r v. Baker*, 5 B. Monroe, 172; *Brown v. Harley*, 2 Florida, 159; *Camp v. Gainer*, 8 Texas, 372.

For this error, the judgment must be reversed, and remanded, with instructions to the court below to award execution.

WILMINGTON, *Adm'r, v. SUTTON.*

An administrator of a deceased husband cannot maintain an action of replevin against the vendee of the widow, or those claiming under her, for the recovery of property of the husband, left with the widow, as the head of the family, and exempt from administration, or as belonging to her distributive share of her husband's estate, after the payment of debts.

Where personal property is left with a widow, as the head of the family,

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for the benefit of herself and children, she holds it as trustee for the heirs, and either has no power to sell, or if she has, she must be held to account to the children for their interest in the same.

If she received the property as her distributive share of her husband's estate, it becomes her's, absolutely, without any obligation to account for its disposition to the children.

In neither case, has the administrator of the husband, a shadow of right to the property.

Appeal from the Appanoose District Court.

SATURDAY, APRIL 10.

Wilmington, as administrator of the estate of Michael S. Beaver, brought his action of replevin for four head of work cattle, in the possession of the defendant, Sutton. It is admitted that the property belonged to said Beaver, at the time of his death. It is also admitted that he left a widow, who afterwards intermarried with one Moore. Defendant also admits that plaintiff is the administrator of Beaver, and that said Beaver left minor children him surviving, who resided with their mother as the head of the family. The answer sets up that Moore was the owner of the property, as the husband of the late widow of said Beaver; that the property was set apart to her as widow aforesaid; and that she surrendered the same to the said Moore, who sold the same to defendant, with her knowledge and consent. The replication denies the right of Moore to sell the property; and denies that the widow had any right to surrender the same to her husband, or that said property was ever set apart, legally, to said widow, so as to enable her to dispose of the same by sale, or otherwise. It is also averred that the sale to Sutton, was not made until after the death of the said widow and wife of Moore. The defendant asked the following instruction, which was refused: "*First.* If the jury find that the property claimed by plaintiff, was left to the widow of Beaver, as the head of a family, and as such was exempt from execution; that it was not appraised nor sold as the

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assets of the estate ; that said widow married Moore, and surrendered the said property to him, after her marriage, and reserved no right to herself, in any manner ; and that defendant purchased said property of Moore, in good faith, and for a valuable consideration, they must find for the defendant." Judgment for plaintiff, awarding him the possession of the property, and for costs. Defendant appeals.

Harris & Galbraith, for the appellant.

Milton & Cummings, for the appellee.

WRIGHT, C. J.—We think it fair to conclude from this record, that the cattle in controversy were in the possession of the widow, either as property exempt from administration, or as belonging to her distributive share of her husband's estate, after the payment of debts. By the Code, it is made the duty of the administrator, to omit from the appraisement and administration, certain personal property, but such property is to remain with the widow, for her use, and that of the family, until disposed of according to law. Section 1329. And while this property may not have been, within the meaning of this section, exempt, yet by section 1393, the county court has power, when the circumstances of the family require it, to direct a partial distribution of the effects on hand, in addition to what is set apart by said section 1329. And then, by section 1390, the personal property of the deceased, not necessary for the payment of debts, nor otherwise disposed of, shall be distributed to the same persons, and in the same proportions, as though it were real estate. By section 1394, one-third in value of all the real estate of the husband, is, under the direction of the court, to be set apart to the widow in fee simple. This last section was repealed by chapter 61, Laws of 1853, 98, and the widow's dower in the husband's real estate, was fixed as at common law. But by section 4 of that chapter,

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it is provided that she shall receive the same amount of personal property as is given to her by section 1390 of the Code, *and that her title thereto shall remain absolute.* Assuming, therefore, that she held this property, either as a part of her distributive share, or as exempt from administration, could the administrator of the husband maintain this action? We think most clearly not. And if it had continued in her hands, or possession, there would have been, perhaps, no pretence or claim that he could maintain the action. But the ground of the claim, we suppose to be, that she could not surrender it to her husband, or any person else, so as to deprive the estate of her first husband of the right to reclaim it, and subject it either to the payment of debts, or hold it for the benefit of the heirs: and in consonance with this view, it is urged that she holds this property, under the Code, not alone in her own right, and for her own benefit, but also for the benefit of the children, as the head of the family; that upon her death it goes to them; that a second husband, by virtue of the marital relation, could not come into the possession of it, so as to control and dispose of it, as he might, and is permitted to do, with property absolutely hers; and that, finally, as she could not sell it, neither could he, so as to divest the administrator of the first husband of his right, upon such sale, to demand its possession.

For the purposes of this case, we may concede that the property belongs to the widow, as the head of the family, for the benefit of herself and children; and we may also concede, that holding it in the capacity of trustee, she either has no power to sell, or if she has, she must be held to account to the children for their interest in the same; and yet, what right has this administrator to this action? If it was hers, absolutely, without any obligation to account for its disposition, to the children, then it is most manifest, that the administrator could have no shadow of right to it. He represents and has a right to control the property which belonged to the estate of the intestate, in the nature of assets to be administered, and not that which

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belongs to the widow or any other person. In fact, in such a case, he would have no more right to the property, or to its possession, than if it never had belonged to the intestate, or if it had been sold by him during his life time.

Is his right to this action upon any better ground, if she is to be treated as the trustee of the children? We think most clearly not. It must be remembered that this is a contest, not between the children, or their representatives, and the vendee of the wife, or her second husband. Whatever may be the rights of the children, it is clear that the plaintiff occupies no position to assert those rights, in this action. He does not represent them, but a distinct, and to some extent, a conflicting, interest. He claims it as administrator of the first husband: claims, of course, that it is, or should properly be, assets in his hands, to be disposed of as all other property. And thus, in any view, his claim is in conflict with both the absolute right of the wife to control and dispose of it, and also the claim of the children, to take it upon her death, as part of the family. In no event would it, upon her death, revert to the estate. We conclude, therefore, that the instruction substantially embodied the law. Of course, if the property never did come into the rightful and legal possession of the widow of Beaver, and the administrator, for this reason, had a right to reclaim it, a different question would arise. This instruction, however, assumes that the jury shall find such rightful and legal possession in the widow, and upon this assumption, we think, it is correct, and should have been given.

Judgment reversed.

LYON v. BUNN.

An answer to a petition on a promissory note, which "denies that the defendant is indebted to the plaintiff in the sum named in the petition, or in any less sum, and that the defendant made and executed the

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note described in said petition, as therein alleged," is sufficient to put in issue the execution of the note sued on, in the same manner as the plea of *non est factum* would have done, in an action of debt under the old system of pleading; and such allegations in an answer, are not irrelevant and redundant.

In order to make an issue as to the execution of an instrument, on which suit is brought, the first section of the act entitled "An act relating to evidence," approved January 24, 1858, does not require that the answer of the defendant, denying its execution, should be sworn to.

The act of 1858, gives to the defendant the privilege of denying the execution of the instrument sued on, under oath, and when he does so deny it, the burden is changed to the plaintiff, who must prove the execution.

And such an answer sufficiently denies, specifically, every material affirmative allegation of the petition, is directly responsive to the petition, and presents an issue of fact for trial.

Appeal from the Polk District Court.

SATURDAY, APRIL 10.

Suit on a promissory note. The defendant answered, denying the indebtedness claimed, and the execution of the note. Judgment was rendered for the defendant, on certain motions and a demurrer to the answer, filed by the plaintiff, from which he appeals. The other facts, appear in the opinion of the court.

White & Waterman, for the appellant.

Bates & Phillips, for the defendant.

STOCKTON, J.—The petition is framed upon a promissory note for four hundred dollars, and is substantially in the form given by the Code, section 2518. By his answer, the defendant "denies that he is indebted to plaintiff in the sum of four hundred dollars, as claimed in the said petition, or in any less sum; and denies that he made and executed the note described in the said petition as therein alleged."

1.—The plaintiff moved the court "to cause to be ex-

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punged from the answer, so much thereof as denies the execution of the note sued on." This motion was overruled by the court. It is claimed by plaintiff, that so much of the answer as denies the execution of the note, the same not being under oath, raised no issue of fact, and is irrelevant and redundant, and that the court should have caused the same to be expunged under the Code, sec. 1753.

Under the law as it stood previous to the adoption of the Code, a party was not permitted to deny, on the trial, the execution of any instrument of writing on which suit was brought, unless such denial was under oath. Act of February 10th, 1843. Rev. Stat. 470, section 12. The signature to a promissory note was considered *prima facie* evidence of its execution; but when denied under oath, the party offering it in evidence, was required to prove the signature. Act of February 8th, 1843. Rev. Stat. 455, section 10. In *Chambers v. Games*, 2. G. Greene, 320, it was held, under the acts above cited, that the plea of *non est factum*, although not sworn to, put in issue the execution of the note sued on, but did not cast upon the plaintiff the burden of proving its execution. No objection was taken, in that cause, to the plea, and it was treated as the general issue by the parties. The act of 1843, was repealed by the Code, in 1851; after which time, there was no statutory provision on the subject, until the taking effect of the act of January 24th, 1853, which provided that it should not be necessary for the plaintiff to prove the execution of a promissory note sued on, unless such execution was specifically denied by the defendant under oath. Session acts, 1853, chapters 108, 187, section 1.

We regard the answer in this case, as sufficient to put in issue the execution of the note sued on, in the same manner as the plea of *non est factum* would have done, in an action of debt under the old system of pleading. There is nothing to render such an issue inappropriate in this suit; and the matter of the answer complained of as irrelevant and redundant, is, in our view of the subject, responsive to the petition, and altogether pertinent. It

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was not necessary, that the answer should have been sworn to, in order to make the issue on the execution of the note. The act of 1853, does not require it. It gives to the defendants, however, the privilege of denying the execution under oath; and when he does so deny it, the burden is changed to the plaintiff, who must prove the execution.

2. The plaintiff also moved the court to strike the answer from the files, on the alleged ground, that it does not contain a specific admission or denial of each affirmative allegation of the petition, and presented no issue of fact to the court. For the reasons before given, we think this motion was properly overruled. The petition alleges that the defendant executed and delivered to the plaintiff the promissory note sued on, for four hundred dollars, which note he alleges is due and unpaid, and asks judgment for the amount of the same. The answer is a denial of the execution of the note, and a denial of any indebtedness to plaintiff in the sum of four hundred dollars, or any less sum, as claimed in the petition. It is hardly necessary for us to point out, how directly responsive this answer is to the allegations of the petition.

3. The plaintiff demurred also to the answer, and the following causes of demurrer were assigned: 1. That the answer was not responsive to the petition, in as much as it was a plea of *nil debit* to an action of *assumpsit*; 2. That the execution of the note sued on, not being specifically denied, the answer presents no issue of fact to the court. The demurrer was properly overruled. The questions raised by it, are in no respect different from those previously raised by the plaintiff on his motions; except that it is now claimed that the petition is in *assumpsit*, and the answer is a plea of *nil debit*. As all technical forms of action and of pleadings are abolished by the Code, and as plaintiff's petition is substantially in the form given by the Code, we do not perceive that there is any justice in the claim now made, that the action is in

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assumpsit. The petition assumes as nearly the form of a declaration in debt on a simple contract, as it does a declaration in assumpsit; and as the answer, by a fair and natural construction, shows a substantial cause of defence, it was not liable to the objections made to it on the demurrer.

Judgment affirmed.

HOLLOWAY v. BAKER.

6	52
112	298

The fact that an appeal was taken and allowed from a judgment rendered by a justice of the peace, more than ten days before the first term of the district court, after the appeal was taken, and that the justice failed to return the original papers, with a transcript of the entries on his docket, to the district court, until after said first term had elapsed, constitutes no ground for affirming the judgment of the justice, on motion of the appellee, at a subsequent term.

The law does not affix, as a penalty on the appellant, for a failure of the justice to do his duty, that the judgment shall be affirmed.

Appeal from the Mahaska District Court.

SATURDAY, APRIL 10.

This cause was originally tried before a justice of the peace, and judgment rendered for the defendant. The plaintiff, on the same day, filed his recognizance for an appeal to the district court, with sureties approved by the justice, and the appeal was allowed. The justice did not make his return, with the original papers, and a transcript of the entries on his docket, to the first term of the district court, after the appeal was taken, though said term was held more than ten days thereafter. Before the commencement of the second term, however, the transcript and papers were filed in the district court; and, on the second day of the term, the defendant moved the court to affirm the judgment, for the reason that the cause was appealed more than ten days before the first term of the

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district court after the appeal was taken, and the transcript and the papers, from the justice of the peace, were not filed in said court until the said first term had elapsed. This motion was sustained, and the judgment of the justice affirmed, from which the plaintiff appeals.

W. H. & J. A. SeEVERS, for the appellant.

Rice & Loughridge, for the appellee.

STOCKTON, J.—We think the court erred in affirming the judgment, under the circumstances. The appeal was allowed and perfected on the day on which the judgment was rendered by the justice of the peace. In such case, the law does not require that notice of the appeal should be served on the appellee. It is the duty of the justice to make his return to the district court, five days before the beginning of the term. On his failure to do so, he may be compelled, by rule of court, to make or amend his return. Code, section 2338. The law does not, however, affix, as a penalty on the party, for the failure of the justice to do his duty, and file the transcript and papers, that the judgment shall be affirmed. When the return of the justice is filed in the office of the clerk, whenever that may be, the cause is to be deemed in the district court. Code, sec. 2337. On the neglect or refusal of the appellant, to take any measures to get the cause into the district court, after an appeal taken, the appellee may have the cause docketed himself, and the appeal dismissed, or the judgment affirmed, as justice may seem to require. In this instance, the justice had made his return, and the cause was regularly in court, before the term at which the motion of appellee was made to affirm the judgment. Under the circumstances, the judgment of the district court must be reversed.

Judgment reversed.

Patterson v. Stiles.

PATTERSON v. STILES.

It is not necessarily a sufficient ground for quashing a writ of attachment that it does not follow the action, or, in other words, that the suit is against two, and the writ against one of the defendants only.

Nor is it a sufficient reason for quashing an attachment issued in a suit against two defendants, that the attachment bond is made to one, and not to both, defendants.

Where in an action against two defendants, on a joint promissory note, the petition asked an attachment against one of the defendants, on the ground that he had disposed of his property, with intent to defraud his creditors, and upon which a writ of attachment issued; and where at the return term of the writ, the defendant, against whom the attachment issued, moved the court to quash the writ, for the following reasons: 1. That the writ does not follow the action, in this—the cause of action is joint and the suit against two defendants, whilst the writ runs against one defendant only; 2. The petition shows no cause for a joint writ of attachment; the writ is not against both defendants, but against one, when the same could only issue against both; 3. That the attachment bond does not follow the action, it being given to one, and not to both, defendants: which motion was overruled by the district court: *Held*, that the court properly overruled the motion.

Appeal from the Johnson District Court.

SATURDAY, APRIL 10.

In an action against Franklin and Frederic Stiles, on a joint promissory note, made by them, the plaintiffs asked a writ of attachment against the separate property of Franklin Stiles, alleging, as cause why the writ should issue, that the said “Franklin had disposed of his property, with intent to defraud his creditors.” The writ was issued, and levied on the property of the said Franklin Stiles, who appeared and moved the court to quash the writ for the reasons:

1. That the writ does not follow the action in this: that the cause of action is joint, and the suit against two defendants, whilst the writ runs against one defendant only.

6	54
103	476
6	54
116	557

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2. The petition shows no cause for a joint writ of attachment: the writ is not against both defendants, but against one, when the same could only issue against both.

3. That the attachment bond does not follow the action, it being given to one, and not to both defendants.

The motion was overruled, from which decision the defendant appeals.

Clarke & Henley, for the appellant.

William Smyth, for the appellees.

STOCKTON. J.—The only question is, whether the district court properly overruled the motion. The appellants have cited us to the case of *Currier v. Cleghorn*, 3 G. Greene, 523, in which, as they claim, the question has been determined by this court. That was a suit against partners, on a promissory note, made by the firm. The cause alleged for the writ of attachment, applied to one of the defendants only; the writ was asked against his separate estate, and was issued and levied accordingly. The court held, that as it was not shown that the other member of the firm was insolvent, nor that the partnership assets were not sufficient for the payment of the debts, the writ could not issue against the private property of one of the members of the firm; and that where suit is brought on a joint note, the affidavit for the writ of attachment must be against both defendants, or some good cause shown in the affidavit why it could not be so made, in order that the court may be informed why the plaintiffs proceed against the private property of one of the defendants only. The court held, by implication, at least, as we understand it, that if it appears that one of the members of the firm is insolvent, or that the partnership assets are insufficient to pay the debts of the firm; or if any good reason is shown why the affidavit for the writ cannot be made against both of two joint obligors, the writ may issue against one of them only. It is not, therefore, necessarily a sufficient

Bunn v. Pritchard.

ground for quashing the writ, that it does not follow the action; or that the suit is against two, and the writ against one of the defendants only. Nor is it a sufficient reason for quashing the writ, that the attachment bond does not follow the action, in that it is given to one, and not to both, defendants. The case of *Currier v. Cleghorn*, *supra*, is authority for the ruling of the district court, that the bond is to be given to the person against whom the writ issues. It is not set down in the motion, as a ground for quashing the writ, that no cause is shown in the affidavit why the same is not against both defendants, nor why the plaintiffs seek to proceed by attachment against one of the joint obligors only. Whether this objection, if made in the district court, would be sufficient to require that the motion to quash should be sustained, we do not deem it necessary to inquire. It is sufficient that the court did not err in refusing to quash the writ, for the reasons urged. This court has held in *Danforth, Davis & Co. v. Carter & May*, 1 Iowa, 552, that a party is not to be surprised in this court, by new objections and new issues, not made in the district court, upon defects of which he has not been advised by motion or otherwise, and which it would have been in his power to remedy, had objection thereto been taken in proper time and manner.

Judgment affirmed.

BUNN v. PRITCHARD.

It is error to refuse leave to a plaintiff in a suit commenced by attachment, to amend his affidavit for the writ, or to quash the attachment, on the ground of a defect in the affidavit, which is the result of oversight, and which the plaintiff asks leave to amend.

Where an attachment was sued out on the ground that the defendant had property, goods, &c., not exempt from execution, which he refused to give either in payment or security of the debt, and the word "not," between "goods, &c.," and "exempt," was omitted by oversight; and

Lord v. Gaddis.

where the court dissolved the attachment, on account of the defect in the affidavit, although the plaintiff asked leave to file an amended affidavit, as soon as the defect was discovered, which leave was refused. *Held*, That the court erred in refusing the plaintiff leave to amend the affidavit, and in quashing the attachment.

Appeal from the Polk District Court.

SATURDAY, APRIL 10.

Suit by attachment. In the affidavit for the writ, the word "not" was omitted, in stating as the cause for which it was prayed that the attachment might issue, that the defendant had property, goods, &c., *not* exempt from execution, which he refused to give either in payment or as security of the plaintiff's debt. The court dissolved the attachment on account of the defect in the affidavit, although it was shown to have been the mere oversight of the attorney in preparing the papers; and notwithstanding the plaintiff prayed leave to file an amended affidavit, and to rectify the defect, as soon as the same was discovered.

STOCKTON, J.—The refusal of the district court to permit the plaintiff to amend his affidavit, and the order quashing the attachment, were erroneous, and must be reversed. Code, sec. 2511; *Brock v. Manatt*, 1 Iowa, 128; *Graves v. Cole*, 1 G. Greene, 405.

Judgment reversed.

LORD v. GADDIS.

6	57
96	305

An action on a penal bond, for the recovery of damages, is an action founded on contract.

In an action on a penal bond, for the recovery of damages, it is not necessary, in order to obtain an attachment, that the petition should be presented to, and the attachment allowed by, some judge of the

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supreme, district, or county courts, under section 1851 of the Code. Where, in an action for the recovery of damages on a penal bond, the the penalty named in the bond was five hundred dollars, which penalty was not intended as liquidated damages, and the plaintiff claimed one thousand dollars, and in order to obtain an attachment, made an affidavit that that sum was due him from the defendant; and where the defendant moved to quash the attachment on the ground: 1. That the action was not founded on contract, and the attachment had not been presented and allowed, as required by section 1851 of the Code; 2. that the sum claimed was unconscionable and unreasonable, and the petition did not state, as nearly as practicable, the amount due; which motion was overruled: *Held*, That the motion was properly overruled.

Appeal from the Polk District Court.

THURSDAY, APRIL 15.

On the 18th of August 1857, these parties entered into a written contract in relation to the sale of a certain stock of hardware. By this agreement, the plaintiff undertook to sell, and the defendant to purchase, the said stock, upon substantially the following terms: The property was to be inventoried, and defendant to pay the original cost and cost of transportation to Des Moines, and was to pay for the same in four equal instalments, due in six, nine, twelve and eighteen months, with ten per cent. interest. For the faithful performance of each and every of the covenants contained in said contract, the parties bound themselves, each to the other, "in the penal sum of five hundred dollars, as fixed damages." The plaintiff, averring a full performance on his part, brings this suit, claiming one thousand dollars; and for cause, states that defendant had refused to receive said stock; had refused to execute his promissory notes as by said agreement required; and that he has entirely disregarded and violated his said contract, and failed and refused to perform any part of it. The petition also avers that the defendant has disposed of his property with intent to defraud his creditors. It is sworn to, but was not pretended to any judge of the supreme, district or county court. Defendant moved

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to quash the attachment, which motion was overruled, and he now appeals.

White & Waterman, for the appellant.

J. E. Jewett, for the appellee.

WRIGHT, C. J.—Two questions are presented for our determination :

And first, should the petition for the attachment have been presented to some one of the judges mentioned in sec. 1831, of the Code, that an allowance might be made thereon of the amount in value of the property to be attached. We think not. The language of this section is, that if the demand *is not founded on contract*, the original petition must be presented to some judge, &c. This action is founded on contract, and therefore is not governed by the section cited.

But it is urged that the damages are not settled, or liquidated, by the contract itself; but are uncertain and indefinite, and that it is only where the contract self fixes the amount, that it is unnecessary to so present the petition. We think, however, that the dividing line is between actions *ex contractu*, and those *ex delicto*. We concede that difficulties may arise, and injustice and wrong may result from this construction, yet we can conceive of no other one, so likely to be plain, or which may not be open to the same objections. By the words "*founded on contract*," we are unmistakeably referred to one of the general divisions of actions, as known at the time of the adoption of the Code. A case may arise, (and this is one of them), where there is dispute as to the amount due, and yet the demand—the claim—grows out of, and is founded on, contract. Plaintiff does not sue for a *tort*, but to recover damages resulting from the violation of this contract on the part of defendant. And in this same sense, every action *ex contractu* is to recover damages. The old action of *assumpsit*, "sounded in damages." In debt, there was

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a recovery for the amount liquidated, and damages for the detention. This is the view taken of the law in *Raver vs. Webster et al*, 3, Iowa, 502, and with that decision we are still content. See, also, *Johnson & Stevens vs. Butler*, 2 Iowa, 535.

It is next urged that the attachment should have been dissolved, because the amount claimed in the petition of plaintiff, is unconscionable and unreasonable, and that the petition does not state, as nearly as practicable, the amount due. The petition states that there is due plaintiff, by reason of the failure of defendant to comply with said contract, the sum of one thousand dollars. This is sworn to in proper form and substance. So far, then, the petition does state the amount to be due, and for ought that appears, as nearly as practicable, the exact or true amount. So far as relates to the question, that the amount claimed is unconscionable and unreasonable, we have only to say, that this, if true, would not operate to dissolve the attachment. If the plaintiff in his petition claims an excessive amount, he may thus render himself liable upon his bond; but if his affidavit, and the other proceedings, comply with the law, his attachment must continue in force. But, granting that an attachment might be dissolved for the reason urged, we answer, that there is nothing to show that the amount here claimed is excessive. Defendant admits that the five hundred dollars mentioned in the contract, is not to be treated as *liquidated damages*, but as a penalty. This granted, then, how can we know that one thousand dollars is more than the damages actually sustained by plaintiff? There is nothing in the case so far, certainly, to negative the position that he has been injured to that amount. If on the trial, it should turn out otherwise, or if he sustained no injury, defendant is amply and fully protected, by the bond, which the law requires for the purpose of meeting, among others, the very cases which the defendant claims this to be.

Judgment affirmed.

Meeker v. Sanders.

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6	60
78	485
6	60
85	290
6	61
110	440

The facts stated in the answer of a garnishee, when not controverted, are to be taken as true.

The debts due by the assignor to his creditors, are a sufficient consideration for the making of an assignment for the benefit of creditors; and in order to make such an assignment valid, it is not necessary, that a consideration should pass from the assignee to the assignor.

When possession accompanies the conveyance of personal property, it is not necessary that the deed should be acknowledged and recorded.

Where the intention of a grantor can be ascertained from the deed, with reasonable certainty, the want of minute accuracy, and the disregard of the usual forms, will not render the instrument void.

The fact that an assignment for the benefit of creditors, contains no schedule of the debts intended to be secured; that no inventory is given of the property conveyed; that the rights of the creditors are not distinctly defined; and that no specific directions are given to the trustee, as to the time within which the property is to be converted into money, are not sufficient to render the assignment void.

An assignment for the benefit of creditors, in which the assignor declares that "the possession of the goods, and the use of the store-house, are given to the assignee, and the notes and accounts transferred to him, to the end, and for the purpose of executing the trust, and the payment of the debts as fast as possible, and as they become due," does not, by this language, give a preference to any creditor, by reason of his debt first falling due.

Where an assignment, for the benefit of creditors, authorized the assignee "to take such steps for the sale and disposition of the goods, as he may deem proper: *Held*, That no intent to hinder and delay creditors, could be inferred from the language used.

If a deed of assignment, for the benefit of creditors, does not convey all the property of the assignor, liable to the payment of his debts, it is good for what it does convey; and that it does not include all, is no sufficient reason for adjudging bad, for what it does include.

No neglect of duty by the assignee, and no misapplication of the trust funds, will render an assignment, for the benefit of creditors, void.

Where two persons were garnished, and in their answer one of them professed to hold the property, &c., in his hands, under an assignment of the judgment debtor, for the benefit of creditors; and where the answer, as to the other garnishee, alleged that his name, as assignee, was left out of the assignment by mistake, and that he had been acting under the orders and control of the assignee whose name was inserted in the deed, which answer was not denied; and where the court rendered judgment against both the garnishees for the amount of the judgment against the principal debtor, with costs: *Held*, 1. That the

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proceedings against the garnishee, whose name was omitted from the assignment, and who was acting under the assignee, should have been dismissed; 2. That the judgment against the garnishees was erroneous.

Appeal from the Henry District Court.

THURSDAY, APRIL 15.

Meeker & Perkins commenced suit, by attachment, against John Bowman, and, garnished Sanders and Shaw, notifying them to appear at the next term of the district court and answer interrogatories. At the next (April), term, Bowman having failed to appear and answer, judgment by default was rendered against him, for the sum of \$731 27, and costs. The garnishees having, also, failed to appear and answer, a default was rendered against them. At the next (August,) term of said court, the garnishees appeared, and moved to the court to set aside the default, and to permit them to answer; and such proceedings were had, that the garnishees were permitted to, and did, file their answer. The answer of the garnishees denies that they are in any manner indebted to the said Bowman, or that they owe him money or property not yet due; denies that they jointly or severally have in their possession, or under their control, any money, property, rights or credits, of the said defendant; and denies that they know of any debts due or owing the said defendant, either due or not due, and now in the possession, or under the control of others. The answer then explains and qualifies the denials in response to the statute interrogatories, by stating that the garnishees have, and have had since the 5th of January, 1857, each one in the relations as hereinafter described a stock of goods, books, accounts, notes, and evidences of debt, &c., of the aggregate value of four thousand dollars, which they are advised and believe, were once the property of the said Bowman; that the said stock of goods, &c., were assigned to said garnishees, for the benefit of the creditors of said Bowman; that upon the sufficiency of the said assignment, and the rights it confers, depends

the truth or falsity of all the answers herein as to the property of the said defendant, Bowman; that the said garnishees, at the request of said Bowman, and without any consideration whatever, moving from them, entered upon the duties of the said trust, and took possession of the property referred to in the said assignment; that they are engaged in selling the said goods, collecting said notes, &c., with a view to the perfect and complete execution of said trust; that they are at all times ready and willing to make a complete statement of their doings under said assignment; that the name of the said Shaw was, by the mistake of the draftsman, and by mere oversight, omitted in the said assignment; that in consequence of such omission, the said Shaw has followed the instructions of his co-respondent, Sanders, to whom he looked, and upon whom he relied; that the said Shaw has assisted in the execution of said trust, under the direction of the said Sanders; that all the creditors of the said Bowman, and among them the said plaintiffs, were duly notified of the said assignment, long before the attachment against the said Bowman was issued; and that said assignment was executed and recorded, and the trust entered upon by the said garnishees, before they were served with the process of garnishment.

Appended to the answer of the garnishees is a copy of the assignment, which reads as follows: "For the purpose of securing all my creditors, to whom I am in any manner indebted, I hereby voluntarily set over, transfer, and assign, to Alvin Sanders and ———, the entire stock of goods now in store at my store-house on the west side of the public square, in the city of Mount Pleasant, Henry county, Iowa, hereby authorizing them to take such steps for the sale and disposition of such goods as they may deem proper, together with all the books of account, notes, and every other evidence of debt coming to, or owing to me; and to this end, possession of such goods, and the use of the store where the same are, is hereby given to my said assignees, and the books and notes transferred, for the

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purpose of executing this trust, and the payment of the debts, hereby secured, as fast as possible, and the same become due. In witness whereof, I have hereunto set my hand, this 5th day of January, 1857. J. BOWMAN."

The assignment was properly acknowledged, but does not appear to have been recorded. No replication was filed, denying the matters stated in the answer; and after argument, the court rendered judgment against the garnishees for the amount of the judgment against Bowman, with costs. From this judgment the garnishees appeal, and allege that the court erred in rendering said judgment.

J. C. Hall, L. G. Palmer and S. McFarland, for the appellants. [The reporter found, on the files of the court, no brief on the part of counsel for the appellants.]

Rufus L. B. Clarke and C. H. Phelps, for the appellees, made the following points:

I. Was the assignment valid on its face, as against creditors? 1. It did not comply with the statute. Code, 154, sec. 977; *Ib.*, sec. 1193; and it must be deemed a conveyance to hinder and delay creditors. 2 *Douglass*, 176; 4 *Denio*, 217; *Burrill on Assignments*, 384; 2 *Comstock*, 265. 2. It did not conform to the requisites of the common law. No consideration is expressed, and the assignees are not creditors. 15 *Pick.*, 11. No sufficient terms of conveyance are used. *Burrill on Assignments*, 239. The assignment is general, to secure all the creditors, and yet reserves the store-house. *Brashear v. West*, 7 *Peters*, 608; *Burrill*, 235, note 2; 11 *Wend.* 187; 6 *Hill*, 438. It does not declare the uses to which the goods are to be applied. *Burrill*, 197; *Nicholson v. Leavitt*, 2 *Seld.*, 510. No time is specified within which the assignees are required to turn the property into cash, and distribute the proceeds. *Burrill*, 249, 2 *Kent Com.*, 370; *Webb v. Daggett*, 2 *Barb.* sec. 9; *Barney v. Griffin*, 2 *Comst.*, 365; 9 *Smedes & M.*, 394; 10 *Paige*, 223; 7 *Ib.*, 568; 6 *Barb.*,

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91; *Sheldon v. Dodge*, 4 Denio, 217; 7 Howard, 277; Burrill, 383; 1 Am. Lead. Cases, 96. No directions are given for the distribution of the funds, and it makes no settlement of the rights of creditors. 7 Paige, 568. Nor is a creditor named. Burrill, 399. No schedule of the property assigned, or of the notes transferred, nor even of the gross value of the property, is given. *Stevens v. Bell*, 6 Mass., 339; *Pierpont v. Graham*, 4 Wash., D. C., 232; *Hume v. Richardson*, 5 New Hamp., 113; *Cunningham v. Freeborn*, 11 Wend., 240.

II. Even if the assignment was valid on its face, and under the statute, and at common law, does it, with the attendant facts and circumstances detailed in the answer, afford a sufficient reason why execution should not issue against the garnishees?

STOCKTON, J.—It was not necessary for the garnishees to have the judgment by default against them set aside, in order to enable them to answer; for by mere failure to appear in answer to the garnishee summons, they were not liable to pay the amount of the plaintiff's judgment against Bowman, until they had had opportunity to show cause against the issuing of an execution. Code, section 1870. The judgment having been opened, however, and the garnishees permitted to answer, showing the amount of money and property in their hands, and the manner in which it was held, the proceedings against Shaw, one of the defendants, should have been dismissed. He was not one of the assignees under the deed. He was acting under the orders of his co-defendant, Sanders; and if there was any of the property of Bowman in his hands, it was subject to Saunders' order and control. All this is shown by the answers of Shaw and Saunders. The deed of trust is made part of the answer of Saunders, and he explicitly declares that he claims to hold the money and property in his hands, by virtue of the deed, and for the benefit of all the creditors of Bowman. The facts contained in this answer, the same not being controverted, are

to be taken as true; and taking them as true, we are to inquire, whether the plaintiffs were entitled to a judgment against the assignee, for the amount of their claim against Bowman. It is recited by the deed, that the grantor, for the purpose of securing all his creditors, to whom he is in any manner indebted, assigns and transfers to Alvin Saunders, his entire stock of goods, together with all book accounts, notes, and other evidences of debt, authorizing him to take such steps for the sale and disposition of the goods as he may deem proper; and to this end, possession of the goods, and the use of the store-house, are given to the assignee, and the books and notes transferred, "for the purpose of executing this trust, and the payment of the debts hereby secured, as fast as possible and they become due."

The deed, it is urged by the plaintiffs, is void as to the creditors of Bowman, as not being in compliance with the statute, and for the reason that the design and effect of the same is to hinder and delay them in the collection of their debts. We think there can be no question but that the deed is made upon a sufficient consideration. The debts due from Bowman to his creditors were a valuable consideration, in the highest sense of the term. Burrill on Assignments, 219. It was not necessary that there should be a consideration passing from Saunders to Bowman. Saunders was the mere trustee of the creditors,⁷ whose debts were designed to be secured by the deed. Where possession accompanies the conveyance of personal property, it is not necessary that the deed should be acknowledged and recorded. In this case, the possession of the goods, both in law and in fact, was in Saunders; and it is not, under such circumstances, a valid objection to the deed, that it was not duly acknowledged and recorded.

The deed of assignment is not drawn with that regard to forms, nor with that accuracy of expression, at all times desirable in such instruments. A strict observance of the proper legal terms, and the apt use of words, generally, while it always tends to prevent confusion and misunder-

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standing, is often the means of shutting out tedious and unprofitable litigation. We think, however, there can be no mistake as to the trust upon which the property, in this instance, is conveyed. It is sufficiently declared that it is for the purpose of securing the claims of all the creditors to whom the grantor is in any manner indebted, and that the possession of the goods, and the *choses* in action, are transferred to the trustee "for the purpose of executing this trust, and the payment of the debts secured, as fast as possible." Where the intention of the grantor can be ascertained, with reasonable certainty, the want of minute accuracy of language, and the disregard of the usual forms, should not render the instrument void. Nor is the fact that the deed contains no schedule of the debts intended to be secured; that no inventory is given of the property conveyed; that the rights of the creditors are not distinctly defined; and that no specific directions are given to the trustee as to the time within which the property is to be converted into money; all these things, though they, in some sense, constitute an objection to the deed, are not sufficient to justify us in holding it, on that account, void.

It is insisted upon by the plaintiff, that the conveyance is invalid, for the reason that, being a general assignment of property, for the benefit of creditors, it does not provide for the payment of their claims *pro rata*, but for their payment "as fast as they become due;" which, it is claimed, is in derogation of that provision of the Code, which requires that the assignment shall be made for the benefit of all creditors of the grantor, in proportion to the amount of their respective claims. Code, sec. 977. It is true, that it is not expressly stipulated or directed in the deed, that the claims of the several creditors are to be paid *pro rata*; but even if it is conceded that the grantor designed that they should be paid as their debts became due, it is by no means a necessary inference from the language used, that he intended they should be paid *in full*, in the order of their falling due. Such an inference might be a legiti-

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mate one, if the property conveyed was sufficient for the payment of all the debts. But as the assignment was for the benefit of all the creditors, the natural inference is, if there is not enough to pay all, they are to be paid *pro rata*, or in proportion to their amounts, respectively. The grantor declares that the "possession of the goods, and the use of the store-house, are given to the assignee, and the notes and accounts transferred to him, to the end, and for the purpose of executing the trust, and the payment of the debts, as fast as possible, and the same become due." We think that no preference is given, by this language, to any creditor, by reason of his debt first falling due.

It is further insisted by plaintiffs, that the effect of the deed is to hinder and delay creditors, in the collection of their debts, and that the same is therefore fraudulent and void, for the reason that the grantor has not stipulated that the goods shall be sold by the assignee for cash only; but that by authorizing him "to take such steps for the sale and disposal of them as he may deem proper," it permits him to sell them on credit. In New York, it has been determined, that a clause in a deed of assignment expressly empowering the assignee to *sell on credit*, avoids the whole assignment, its tendency and effect being to hinder and delay creditors. *Barney v. Griffin*, 2 Comstock, 365; *Burrill on Assignments*, 197, 198. The contrary doctrine has, however, been held in Alabama. *Abercrombie v. Bradford*, 16 Alabama, 560; *Ashurst v. Martin*, 9 Porter, 566. In this case, no express power or direction has been given to the assignee, to sell on credit; and no intent to hinder and delay creditors, can justly be inferred from the authority given to the assignee "to take such steps as he may deem proper for the sale and disposition of the goods."

As to the objection that the grantor has not, by the deed, conveyed all his property, for the benefit of his creditors, we can only say that it does not appear that the grantor has any property not embraced by the conveyance.

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We cannot assume that he owned the store-house in which the goods were exposed for sale, or any other property not conveyed, and liable for the payment of his debts. If the deed does not convey all of his property, it is good for what it does convey. That it does not include all, is no sufficient reason for adjudging it bad for what it does include. It can hardly be fairly argued that it is a general assignment, because it conveys all his property, and yet that it is void, because, being a general assignment, it does not convey all his property. A general assignment must make provision for the payment of all claims, *pro rata*; yet, if it does not purport to convey all the grantor's property, for the payment of his debts, it is not a general assignment.

It is a sufficient reply to the objection, that the assignee is offering to sell the goods on credit, and to exchange them for country produce, that no neglect of duty by the assignee, and no misapplication of the trust fund, will render the conveyance void. It is at any time within the power of the creditors, to require the assignee to report to the district court, the condition of the trust estate, the names of the creditors, and the amount of the debts, as far as ascertained. So, the assignee may be required to give bond for the faithful performance of the trust; and if he has been negligent of the performance of his duty, or wasteful of the trust property, he may be removed from his position, and another assignee appointed in his stead.

There is no pretence that the plaintiff's claim is not as fully provided for by the assignment as that of any other creditor. It will be paid like others at the proper time, by the assignee, and if the property conveyed is not sufficient to pay the debts in full, they must expect to share with the other creditors *pro rata*. It is only a question whether they shall be thus paid, or whether the deed of trust shall be declared invalid, and they permitted to claim payment in full. It certainly recommends itself to our sense of fairness and equality, that the insolvent's property be divided ratably among all his creditors. There may be

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enough to pay all. It might not result in any injustice to others to allow the plaintiff, by the judgment against the assignee, to enforce the payment of their claim in full. We are certain it will not so result, if the property is held, as provided by the Code, sec. 977, for the benefit of all the creditors, in proportion to the amount of their respective claims.

Judgment reversed.

 ARBUCKLE v. BOWMAN *et al.*

6	70
87	022

While there is no provision of the Code, expressly giving the power to order the substitution of the true name of a party, when ascertained, yet it is entirely competent for the court to so direct, under the numerous and liberal provisions which give the right to amend pleadings, or any paper in a case.

It is erroneous to render judgment, by default, against a party after he has answered, and while the answer is still on the files of the court.

Where, in an action on a promissory note, one of the makers answered, denying the execution of the note, and averring full payment, to which answer no replication was filed; and where the cause was tried by the court, without a jury, and it appeared from the transcript, that the cause was tried upon the issues joined, and a judgment rendered for the plaintiff; and where it was claimed in the appellate court, that the answer being undenied, the judgment should have been for the defendant, but it did not appear, from the transcript, that the defendant had claimed in the court below, that his answer had been admitted, or was to be taken as true: *Held*, 1. That whether the answer contained any affirmative allegation, which required a denial under section 1742 of the Code, *quære?* 2. That under the circumstances of the case, the objection had no weight at that stage of the proceedings.

Appeal from the Marion District Court.

THURSDAY, APRIL 15.

This action was brought against Bowman, Walker and Walters, to recover upon a promissory note made by B. and W., to Walters, and by him assigned to plaintiff.

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Bowman appeared and plead in abatement, that his name was Bowman, and not Bauman. To this plea there was a demurrer, which was overruled; and it appearing that his true name was Bowman, it was thereupon ordered that all subsequent proceedings in said cause should be conducted against him by his true name. Walters made no appearance. The makers of the note answered, denying the execution of the note—denying that it was the property of plaintiff—and averring full payment. After this, and while this answer was on file, the defendants, Walker and Walters, were called, and (as the record recites), not answering, a default was entered against them; and the cause was heard on the issue made by the answer of defendant, Bowman. On this trial, the issues were found in favor of plaintiff, and judgment accordingly. Bowman and Walker appeal.

J. E. Neal, for the appellants.

George May, for the appellee.

WRIGHT, C. J.—It is first urged, that the court below erred in ordering the name of Henry Bowman to be substituted for that of Henry Bauman, after overruling the demurrer to his plea in abatement. While there is no provision of the Code expressly giving the power to order the substitution of the true name of a party, where ascertained, yet we are clear, that it is entirely competent for the court to so direct, under the numerous and liberal provisions which give the right to amend pleadings, or any paper in a cause. See sections 1759, 1758, 1757, 1855, 1856, and 1694, and *Harkins v. Edwards and Turner* 1, Iowa, 296. We cannot see how any substantial right of the defendant could possibly be prejudiced, by permitting this amendment. He was practically and really as much in court before, as after, this substitution. The change could in no manner take him by surprise, and substantial justice would not seem to require even a continuance of the cause, much less its dismissal.

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It is next objected, that the answer being undenied, judgment should have been for defendant, Bowman. It may be doubted whether this answer contains any affirmative allegation, which required a denial, within the meaning of section 1742, of the Code. Passing this, however, we think for other sufficient reasons, that the objection cannot avail. It seems that defendant, Bowman, appeared and submitted the cause to the court for trial, waiving a jury; that it was heard upon testimony; and that he at no time, either before or after judgment, claimed that his answer had been admitted, or was to be taken as true. No such question was, therefore, ever presented to the court below, and we think it fair to presume, that the cause was heard as if the issue was fully joined. Under the circumstances, we are unwilling to give the objection weight at this stage of the cause.

In rendering judgment by default against Walker, after he had answered, and when it was still on file, there was error. Of this there is no room for doubt.

The judgment is affirmed as to defendant, Bowman, and reversed as to the defendant, Walker.

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Where it appears from the transcript of a record in the Supreme Court, that the cause was submitted to the court below, upon the record and evidence, to be decided in vacation, it will be presumed that this was not done, except by consent.

The appellate court will not presume that any improper testimony was admitted by the court below.

A bill of exceptions, showing the improper testimony admitted, is the proper mode of bringing the matter to the attention of the Supreme Court.

Where a *scire facias* recited, that at the September term of the district court for Marion county, A. D. 1854, an indictment was preferred by the grand jury against one A. T. S. for larceny; that at the next April term of said court, the said defendant appeared, and upon affidavit filed, moved for a change of venue in the cause; that the venue was changed by the court to Monroe county; and the said A. T.

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S., together with T. L. S. his surety, in open court, entered into a recognizance, whereby they acknowledged themselves indebted to the State of Iowa, in the sum of \$500, to be void on condition that the said A. T. S., indicted as aforesaid, but who, *by mistake in the recital of said recognizance*, is stated to have been indicted at the April term of said district court, instead of the *September term*, and who had obtained a change of venue to the county of Monroe, should be and appear at the next term of the district court for Monroe county, and not depart without leave of the court; which said bond was duly taken and approved, and remains of record; and that at the said next ensuing term of the district court for Monroe county, the said A. T. S. not appearing, according to his said recognizance, to answer to said indictment, when solemnly called, but wholly neglecting and refusing so to do, his default was entered of record, and his said recognizance forfeited; and where T. L. S., the only defendant served, appeared and answered, denying the truth of the matters set out in the *scire facias*; that there was any such record as was averred; that there was any mistake in the recital of the recognizance, as to the term of court at which the indictment was found; and that the said T. L. S. ever became the surety of the said A. T. S. upon any bond to appear and answer any indictment, except the one found and presented by the grand jury of Marion county, at the April term, 1855—upon which answer issue was joined; and where the cause was submitted to the court upon the record and evidence, and was taken under advisement, to be decided in vacation; and where, in vacation, the court decided that the said T. L. S. had failed to show cause, and rendered judgment against him for the amount of the recognizance, and costs: *Held*, That there was no error in the record.

Appeal from the Monroe District Court.

THURSDAY, APRIL 15.

This is a proceeding by *scire facias*. The writ recites that at the September term of the district court for Marion county, A. D. 1854, an indictment was preferred by the grand jury, against one Andrew T. Strong, for larceny; that at the next April term of said court, A. D. 1855, the said Strong appeared, and upon affidavit filed, moved the court for a change of venue in the cause, that the venue was thereupon changed by the court to the county of Monroe, and the said Andrew T. Strong, together with Thomas L. Strong, his surety, in open court, entered into a bond

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or recognizance, whereby they acknowledged themselves indebted to the state of Iowa in the sum of five hundred dollars, to be void, on condition that the said Andrew T. Strong, indicted as aforesaid, but who *by mistake in the recital of said bond*, is stated to have been indicted at the April term of said district court, instead of the *September term*, and who had obtained a change of venue to the county of Monroe, should be and appear at the next term of the district court for Monroe county, and not depart without leave of the court, which said bond was duly taken and approved, and remained of record; and that at the said next ensuing term of the district court for Monroe county, the said Andrew T. Strong, not appearing according to his said recognizance, to answer said indictment, when solemnly called, but wholly neglecting and refusing so to do, his default was entered of record against him, and his said recognizance forfeited; whereupon the said Andrew T. Strong, and Thomas L. Strong, are required to show cause why the said recognizance shall not be estreated, and the State of Iowa have execution thereof.

Andrew T. Strong was not served, and made no appearance to the writ of *scire facias*: Thomas L. Strong, the appellant, answered, denying the truth of the matters and things set out in the writ; and that there was any such record as averred; that there was any mistake in the recital of the recognizance as to the term of the court at which the indictment was found; and that defendant ever became the surety of Andrew T. Strong upon any bond to appear and answer any indictment, except the one found and presented by the grand jury of Marion county, at April term, 1855.

On this answer, issue was joined, and the cause was submitted to the court, upon the record and evidence; and was by the court taken under advisement to be decided in vacation. On the 26th of May, being in vacation, the court being fully advised in the premises, rendered its decision, that the defendant, Thomas L. Strong, had wholly

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failed to show any good cause in excuse for the default entered upon the recognizance, and that the same be adjudged forfeited, and that the State of Iowa recover of the said Thomas L. Strong the amount of the recognizance and costs.

James Baker, for the appellant.

George May, for the appellee.

STOCKTON, J.—We see no valid objection to the proceedings had in the district court; so far as they are brought to our notice, they appear to have been regular. If there was any irregularity, the appellant has failed to show it by the record. It is assigned for error that the court permitted testimony to be introduced to contradict the record, and admitted testimony outside of the record. Yet there is nothing to show these facts, nor to show what the testimony was, if any such was introduced. If there was any irregularity in entering judgment in vacation, it is a sufficient answer to the objection, that the record shows that the cause was submitted upon the record and evidence, to be decided in vacation. It will not be assumed by us, that this was done except by consent.

It is objected further, that the court erred in refusing to defendant a bill of exceptions upon overruling his demurrer, and upon the rendition of final judgment. An affidavit of counsel is filed in the cause, with a view of calling the attention of this court to the subject, which states that bills of exception were prepared and placed in the hands of the court, in anticipation of its decision, with the request that they might be signed and made part of the record, if the decision was adverse to the defendant. If the court refused to allow proper exceptions to any of its decisions, and if there was any error in such refusal, it was error without prejudice. Bill of exceptions to the decision on the demurrer, and to the judgment against defendant, were not what his cause required. These were already

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as much a part of the record as any bill of exceptions could have made them.

The issue joined between the parties, was upon the plea of *nul tiel record*, and upon the facts alleged in the writ of *scire facias*. What evidence was given by the parties, in support of the issues on either side, is not made to appear. A bill of exceptions, showing this improper testimony, if any such was introduced, as alleged, was the proper mode of bringing the matter to the notice of this court. We cannot presume that any improper testimony was introduced. It is not pretended that defendant did not have an opportunity to except to improper testimony, or that the court refused to sign and allow all proper exceptions to its admission.

Judgment affirmed.

MARSH v. GRAHAM.

A plaintiff, who voluntarily submits to a non-suit, cannot assign for error, or have reviewed in the appellate court, the rulings and decisions of the court below.

Appeal from the Lee District Court.

THURSDAY, APRIL 15.

The record in this case shows, that the parties appeared, and the cause coming on to be heard, a jury was regularly impannelled and sworn, "and after some other proceedings, the plaintiff takes a non-suit." Judgment was then rendered in favor of defendants, for costs. Afterwards, plaintiff moved to set aside said non-suit, because of error in the instructions given by the court to the jury, which motion was overruled. Plaintiff appeals.

Marsh v. Graham.

H. Scott Howell, for the appellant.

McCrory & Bruce, for the appellee.

WRIGHT, C. J.—It is assigned for error: *First*, That the court below erred in excluding certain evidence; *Second*, In giving certain instructions; *Third*, In overruling the motion to set aside the judgment of non-suit, and reinstate the case.

Appellee first urges that plaintiff, having voluntarily submitted to a non-suit, he cannot assign for error, or have reviewed in this court, the rulings and decisions of the court below. And this position, we think, is correct, and decisive of the whole case.

The Code provides, that when there is no counter claim of defendant to be considered, the plaintiff may, at any time before the jury return with their verdict, submit to a non-suit at his own costs. Section 1803. If a plaintiff shall thus submit to a non-suit, reserving no right or leave to move to set it aside, can he, as in this case, upon a mere motion, unsupported by any showing of equitable circumstances—of surprise, prejudice or mistake—again call upon the court to act, or complain of those rulings which he insists compelled him to withdraw his case from the consideration of the jury? We think not. If there was error in the instructions of the court, in excluding testimony, or in any other particular, he should have excepted at the time, and thus prepared himself for a hearing in this court. When, however, he submits to a non-suit, it is his own voluntary act—he withdraws his case, and is in no better condition to have the rulings of the court reviewed here, than if he complained that there was error in an instruction asked by him, and given by the judge, or that the court had erred in sustaining a motion made by himself. The submitting to the non-suit is his own act, and not the act or decision of the court, and does not prevent the commencement of a new suit, for the same cause of action. This rule we understand to be well settled, where, as in this case, the plaintiff is voluntarily non-suited.

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Moore v. Herndon, 5 Blackf., 168; *Vestal v. Burditt*, 6 Ib., 555; *Evans v. Phillips*, 4 Wheat., 73; *Van Wormer v. Mayor of Albany*, 18 Wend., 169; *United States v. Evans*, 5 Cranch, 280; *Welch v. Mandeville*, 7 Ib., 152.

Judgment affirmed.

HODGES v. HODGES.

It is the duty of a person serving an original notice, to set forth in his return, all the acts by him done, in order that the proper tribunal may judge of their sufficiency.

A return that an original notice was served, or even *duly* served, is insufficient. The manner of service must be shown.

Appeal from the Webster District Court.

THURSDAY, APRIL 15.

Bill for divorce. The original notice was not served by the sheriff, but by one of the attorneys of the complainant. The return states, that he "served the notice on the defendant on the 29th day of August, 1856," and is verified by affidavit. Judgment was rendered against the respondent by default, for want of an appearance, from which she appeals.

Templin, Scheffeler & Fairall, for the appellant.

No appearance for the appellee.

STOCKTON, J.—It is urged that the decree rendered by the district court is invalid, for the reason that there was no sufficient return of the service of the original notice upon defendant. The return does not state the manner of the service, as required by sec. 1723, of the Code. It is the duty of the person serving the notice to set forth, in his return all the acts by him done, in order that the proper

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tribunal may judge of their sufficiency. The law does not permit him to judge of the legality or sufficiency of the service. A return that the notice was served, or even *duly* served, is insufficient. The manner of service must be shown. The court had no right to proceed against the defendant, unless it properly appeared that she was served with notice of the action. *Dills v. Chambers*, 2 G. Greene, 479; *Perry v. Dover*, 12 Pick., 211; *Moore v. Miller*, Harrison, 233; *Converse v. Warren*, 4 Iowa, 158.

Judgment reversed.

6	79
80	30

 PLATT v. HARRISON, *Sheriff*.

After conviction of a criminal offence, by a court having jurisdiction though the conviction may be irregular or erroneous, the party is not entitled to a writ of *habeas corpus*.

The judgment and proceedings of a competent court cannot be revised in another court, upon *habeas corpus*.

Where a party convicted of a criminal offence, has a perfect, well defined, and complete remedy, in the regular and usual method of appeal, he is not entitled to a writ of *habeas corpus*.

Chapter 127 of the Code, which regulates the writ of *habeas corpus*, refers to preliminary examinations, to ascertain whether an offence has been committed, and where the defendant has been committed to answer, before the district court, for an offence charged.

Where a party was found guilty of the offence of selling goods at auction, within the corporate limits of a city, without having obtained a license, as required by an ordinance of the city council, before the police magistrate of the city, and in default of payment of the fine imposed, was placed in the custody of the sheriff of the county, under a proper mittimus; and where, while thus detained in custody, he sued out from the district court, a writ of *habeas corpus*, upon the ground that the city council had no power, under the city charter, to pass the ordinance, and that the same was null and void; and where, on the hearing, the defendant was discharged by the district court: *Held*, That the district court had no power or authority to examine into the legality or regularity of the conviction before the police magistrate, under a writ of *habeas corpus*.

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Certiorari from Linn District Court.

MONDAY, JUNE 7.

Platt was found guilty of the offence of selling goods, wares, &c., at public auction, within the corporate limits of Iowa City, without having a license, as required by an ordinance of the city council. The trial and proceedings were before the proper police magistrate of the city. The fine was assessed at \$25, and the defendant ordered to be imprisoned for fifteen days, unless the fine and costs should be sooner paid. Under the proper *mittimus*, he was placed in the custody of Harrison, as sheriff, and while thus detained, he applied to the district court of Linn county for the writ of *habeas corpus*, on the ground that the city council had no power or authority, under and by virtue of the charter of said city, to pass the ordinance in question, and that such ordinance was null and void. On the hearing, Platt was discharged, and Harrison, the sheriff, now prosecutes this writ.

J. D. Templin & Co., for the plaintiff in error.

Clarke & Henley, for the defendant in error.

WRIGHT, C. J.—The discharge of the prisoner is attempted to be sustained, upon the ground that the city council had no power to pass the ordinance under which he was convicted. It seems to us, however, that we should first inquire, whether the district court had any power or authority to examine into the legality, or regularity of the conviction, under this writ. For, if there was no right to make this examination, then it is immaterial to the present inquiry, whether the council had, or had not, the power to pass the ordinance. To this question, therefore, we direct our attention.

The police magistrate of Iowa City is conservator of the peace; is invested with exclusive original jurisdiction for

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the violation of the city ordinances; and with criminal and civil jurisdiction limited to said city. From his decisions, appeals are allowed to the district court of the county, in all cases, in the same manner as appeals from the judgment and decisions of a justice of the peace. Laws of 1857, p. 435, ch. 255, sec. 1, 2. In this case it is conceded that an ordinance was passed, and in force, punishing the offence with which the petitioner was charged, and for which he was convicted. It is also admitted that the magistrate had jurisdiction to hear and determine the case; that he did hear and determine it, finding the petitioner guilty, and ordering him into custody. But the argument is, that the ordinance was passed without authority of law, and was null and void. Whether it was or not, was a legitimate subject of inquiry by the magistrate, in the same manner as any other question which might be presented for his adjudication. And being determined by him, adverse to the position of the prisoner, his remedy was by appeal, or writ of error, and not by *habeas corpus*. It is not a case where a court has acted without having jurisdiction. On the contrary, the most that can be claimed is, that the magistrate *erred* in deciding that the ordinance was in force, and that the city had the power and authority to provide for the punishment of the offence. Such cases, we do not think, can be reviewed in this manner. The petitioner has a perfect, well defined, and complete remedy, in the regular and usual method of appeal. After conviction by a court having jurisdiction, though the conviction may be irregular or erroneous, the party is not entitled to this writ. The judgment and proceedings of another competent court, cannot be revised upon *habeas corpus*. This, we understand to be well settled. *Commonwealth v. Lecky*, 1 Watts, 68; *Case of Yates*, 4 Johns., 317; 2 Kent, 26, 33; *Storer v. The State*, 4 Mo., 614; *Riley's Case*, 2 Pick., 172; *Bk. U. S. v. Jenkins*, 18 Johns., 305; *ex parte, Watkins*, 3 Peters, 193; *Johnson v. U. S.*, 3 McLean, 89; Code, secs. 2245, 6, 7, 8.

Under the Code, it is true, that the proceedings of a

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committing magistrate may be reviewed upon *habeas corpus*, but not after conviction and execution awarded. The provisions of the Code refer to preliminary examinations, to ascertain whether an offence has been committed, and where the defendant has been committed to answer, before the district court, for the offence charged. After conviction, however, by the magistrate, for an offence within his jurisdiction, the judgment is final and conclusive, until reversed on appeal, or writ of error. Such conviction is as final and conclusive, as that of a court of general jurisdiction, and it is no more allowable to revise the one, than the other, by a proceeding of this character.

Judgment reversed.

6	82
102	98

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The word “hereafter,” in section 1672 of the Code, in relation to the time of commencing an action, has reference to the time when the Code took effect, and not to the time of its passage.

The object of section 1672 of the Code, was to prevent the application of the general rule, contained in section 1671, to causes of action which had accrued prior to July 1, 1851, but were not yet barred, without giving a reasonable time, after the taking effect of the Code, within which to bring the action.

Under section 1672, a party is entitled to *at least* half the time specified in the Code, for the commencement of his action, after the Code took effect.

If, upon the expiration of half the time specified by the Code, the whole period allowed by the first section (1659) of chapter 99, counting from the time the cause of action accrued, has not expired, then the party may sue at any time before that period expires.

An action was commenced on three promissory notes, two of which were dated February 2, 1850, and the other April 24, 1851, and all became due in one day after their respective dates. The original notice was delivered to the sheriff, November 24, 1856, and returned not served, May 18, 1857, the defendant not being found; service was made on the defendant on the 12th of September, 1857. The defendant pleaded the statute of limitations: *Held*, That none of the notes were barred by the statute of limitations.

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Appeal from the Muscatine District Court.

THURSDAY, JUNE 10.

This action was brought on three promissory notes ; two of them dated February 2, 1850, and the third April 24, 1851, and all due one day after their respective dates. The original notice was delivered to the sheriff on the 24th of November, 1856, and was returned not served, (the defendant not being found), on the 18th of May 1857. On the 12th of September, 1857, defendant was served, but when the notice was delivered to the person serving the same, does not appear. The defendant pleaded the statute of limitations. The other facts material to a full understanding of the questions decided, sufficiently appear from the opinion of the court. Plaintiff appeals.

Henry O'Connor, for the appellant.

The only error assigned goes to the sufficiency of the plea of the statute of limitations. The question is one of great importance—important as a question of law, in settling the construction of the statute—and not wholly without importance in the case at bar, the amount being very considerable. I am not aware of any decision of the supreme court on this precise question, and have not been able to find any in the reported decisions. The question must, therefore, I take it, be decided on principle, and in that view it becomes all the more important.

It is evident from section 1659, that it was the intention of the Code to make a distinction as to the time of limitation between written and unwritten contracts ; that the legislature intended to give more solemnity to simple contracts in writing, hitherto considered under the head of parol contracts. Hence, the period of limitation on unwritten contracts, open accounts, &c., which heretofore had six years, and were on the same footing with promissory notes, now have only five years to run, while promis-

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sory notes have now ten years to run, and are put on precisely the same footing with judgments, (except those of courts and record), and actions for the recovery of real property. Now, the construction claimed for the statute in this case, would, instead of enlarging the time of limitation on promissory notes, lessen it, and make those instruments something less, instead of something more, than parol or simple contracts. Let us take the fourth clause of section 1659, and the whole of section 1671, of the Code, and put them together, and see what they will make: The fourth clause of 1659 says: "Those founded on written contracts, on judgments of any courts, (except those provided for in the next section), [courts of record], and those brought for the recovery of real property, within ten years." And then section 1671 says: "The provisions of this chapter are intended to apply to causes of action which have already accrued, and are not yet barred, subject to the regulations contained in the following two sections." Now, leave out the last clause in 1671, and we have this case precisely; here is a written contract upon which a cause of action has already accrued, (when the Code took effect), but which is not yet barred. What applies to it? The provisions of this chapter. And what are the provisions of this chapter? why, that the action shall not be barred short of ten years. Now, how do the regulations, contained in the two next sections qualify it? Not in any way, I think, so far as written contracts are concerned; section 1672 says: "The times hereafter allowed, &c., shall in *no case be less than one half* the periods of limitation herein respectively prescribed," does it follow, as is contended, that they shall in no case be more? If that were so, it would make nonsense of the language—so, at least, it strikes me; if it were so intended, the legislature could have said, and it seems to me would have said, at once, that in all cases on which a cause of action has already accrued, and which is not yet barred, the period of limitation shall be one half the time herein respectively fixed on such causes of action. If there was no other

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subject, or cause of action, for sections 1672 & 1673 to act on, except those of written contracts, there might be some plausibility in claiming for it the construction claimed by defendants; but section 1673, shows, or tends to show, that the provisions of those sections were intended, for unwritten contracts, open accounts, &c.; that is, that the period of limitation in those cases in which the new statute did not enlarge the time, should still have the same time to run which they would have had, if the old statute had not been repealed. But, with regard to those causes of action in which the Code did enlarge the period of limitation, there was no necessity for the saving clause, for those actions had the whole time of the new statute, which was all they could have secured to them by the saving clause, and might be something more. Again: This section 1763 was intended to apply to real actions, or actions for the recovery of real property. Under the statute of 1843, (page 385), the period of limitation was twenty years. Under the Code, it is ten years. There was another class of cases for those "regulations" to affect and operate on. A cause of action for the recovery of real property, might have accrued in 1850, just one year before the Code took effect. It was not barred when the Code took effect. Under the provisions of section 1763, no one will doubt, but that the cause of action would still subsist for nineteen years after the Code took effect.

The legislature meant something, when they enlarged the time of limitations on promissory notes, and provided that the provisions of the act should apply to causes of action which had already accrued, but which were not yet barred. A promissory note is not like an open or running account, or rent, or penalty in a bond, or any of those matters where the sum is not liquidated, but requires evidence *allivnde* to establish it. It is somewhat violent to presume a note paid from lapse of time, and this is the presumption upon which all statutes of limitation are founded. Ordinarily, a man takes up his note when he pays it. In many of the states, the period of limitation on

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promissory notes, is much longer than ten years. In Ohio and Illinois, it was, and I believe is, yet sixteen years. I must say that I think as sincerely, as I ever entertained any opinion in my life, that the limitation on those notes is ten years from the taking effect of the Code. And only regret that it is beyond my capacity to get my ideas as clearly before the court, as they are to my own mind.

Richman & Brother, for the appellee.

The question in this case is, is a note, upon which a cause of action had accrued, and where the old statute had commenced running, before the adoption of the Code, barred in five years after the Code took effect? The defendant contends that it is, and we propose to offer such reasons, and such authority, for that construction, as we may be able to.

An action on a promissory note, under the old statute, was barred in six years. The notes in this case were given February 2, 1850, or two of them were, and a third one on the 24th of April, 1851. The notice was served on the 12th day of September, 1857; and this, we contend, was the commencement of the action. See sec. 1714. It is true, that sec. 1663 somewhat modifies 1714, by making the delivery of the notice to the sheriff, with intent that it be served immediately, the commencement of the action. But the contrary was evidently the intent here, for the petition asks for an attachment; and the ground work for the attachment is, "that the defendant is a non-resident of the State," sworn to by the plaintiff. Thus, it appears, that it was not the intention to have the notice served, but was merely a step preparatory to serving the defendant with notice by publication. The attachment does not figure in the case, as nothing was attached, and jurisdiction was obtained afterwards by a personal service, on the defendant, on the 12th of September, 1857. The point as to when the suit was commenced, is only material so far as the last note is concerned, and not even in regard to

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that, unless the Supreme Court shall hold, as the district court did, that the Code had not altered the rights of the parties, and that it took six years from the time the notes were due, to bar the action. Now, our position is, that the notes were barred in five years, after the taking effect of the Code, to-wit: on the first day of July, 1856. We do not perceive the difficulties under which the plaintiff's attorney seems to labor, in giving a construction to the sections of the Code to which he has referred, namely, sections 1671, 1672, and 1673, and we are somewhat inclined to think, that they are exaggerated, or exist only where he attempts so to construe them, as not to bar his action in less than ten years. Sec. 1671 provides, that "the provisions of this chapter are intended to apply to causes of action which have already accrued, and are not yet barred, subject to the regulations contained in the following two sections." Now, actions had accrued on all of these notes, and they were not yet barred at the time of the passage of the Code, so that they come within the class to be affected by the next "two sections." Sec. 1672 says: "The times hereafter allowed for commencing actions, in such cases, shall not be less than one-half the periods of limitation herein respectively prescribed, except as provided in the next section." Sec. 1673 reads as follows: "But when the period of limitation heretofore fixed by statute, is not enlarged, by the provisions of the first section of this chapter, the time allowed for the commencement of a suit, shall in no case be greater than that fixed by the law heretofore in force, as applied to those cases." Now, it will be seen, that the last section quoted has no applicability to the present case. By its terms it applies only to cases where the periods of limitation are not enlarged. If, then, the period of limitation as applied to promissory notes, is enlarged, section 1673 need not be examined or construed in this case, and we ask that a construction may not be given to it in this case, unless the court find it absolutely necessary to do so, on account of other cases pending, which might be affected. By reference to section

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1659, (fourth subdivision), it will be seen that the Code fixes the period of limitation, on written contracts, at ten years. The period of limitation before the Code, was six years. It is evident, then, that the time has been enlarged, and sections 1671 and 1672 govern the case. This being conceded, it follows that the time allowed for commencing an action, in this case, is one-half the period of limitation fixed by the Code. The whole period is ten years, the half of it is five years; and, consequently, the period within which the action must have been commenced, expired on the first day of July, 1856, the Code having become the law of the land on the first day of July, A. D. 1851.

There was a quibble in the argument of plaintiffs below, and the same quibble may be started again in the Supreme Court. We therefore notice it. It was this: That section 1762, instead of saying "one-half of the period," says "not less than one-half," and it was thence argued that the court could fix the law on a sliding scale; that is, that it could not allow less than five years; but might allow (in its discretion, we suppose), as much more as it thought proper, so that the ten years were not exceeded. We think this answers itself.

WRIGHT, C. J.—We are called upon to determine but one question, and that is, whether plaintiff's right of action upon either, or all of the notes, was barred by the statute of limitations. The Code provides that the delivery of the original notice to the sheriff of the proper county, with intent that it be served immediately, (which intent shall be presumed, unless the contrary appears), or the actual service of that notice, by another person, is a commencement of the action. Section 1663. Whether this action was commenced at the time the first original notice was delivered to the sheriff, or when the service was finally made on the second one, we deem it immaterial to determine, for in either event, we think the plaintiff's action was not barred.

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Under the law in force at the time these notes were given, and when plaintiff's right of action accrued, the action was required to be commenced within six years. The Code provides that actions founded on written contracts, may be brought within ten years, and not afterwards—section 1659. And then, by sections 1671, 1672, and 1673, it is provided, that "the provisions of this chapter are intended to apply to causes of action which have already accrued, and are not yet barred, subject to the following regulations: the times hereafter allowed for commencing actions, in such cases, shall not be less than one-half the periods of limitation herein respectively prescribed, except, that when the periods of limitation heretofore fixed by statute, is not enlarged by the provisions of section 1659, the time allowed for the commencement of a suit shall in no case be greater than that fixed by the law heretofore in force, as applied to those cases."

We have assumed that the law in force at the time plaintiff's right of action accrued, required him to sue within six years thereafter. Of this there can be no doubt as to the notes dated in 1850; for the Code, which repealed, the law of 1843, was not passed until February 5th, 1851. It did not take effect, however, until July 1st, 1851. And the word "hereafter," in section 1672, has reference to that date, and not to the time of the passage of the Code; section 35. *Charless & Blow v. Lamberson*, 1 Iowa, 435. And thus we see that the last note, though dated after the passage of the Code, but before its taking effect, must be governed by the same rule. At the time the Code took effect, then, plaintiff's cause of action had accrued upon all the notes, but it was not barred as to either. If, therefore, the question stood alone upon the provisions of sections 1659 and 1671, the plaintiff might have brought his action at any time within ten years from the time his right of action accrued. And this, and the subsequent provisions, we may remark, were made, as we suppose, to obviate the difficult question which had arisen under the law of 1843, that law containing no rule for the government of

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actions, the causes of which had accrued prior to its taking effect.

And now, the question is, what effect is to be given to the exceptions contained in sections 1672 and 1673. In the first place, we remark, that section 1673 may be left entirely out of consideration, for that applies to cases where the period of limitation heretofore fixed, is not enlarged by the Code, and, as in this instance, the period of limitation is enlarged, we look for our rule alone to section 1672. What effect has this exception upon the general rule, as laid down in sections 1659 and 1671? In other words, what is meant by this section? The answer to these inquiries is, perhaps, best given in the very words of the section. We propose, however, as far as possible, to give additional clearness to its meaning. And first, it is provided that the times hereafter allowed for commencing actions, "*in such cases,*" &c. We ask, in what cases? Manifestly those actions which had already accrued, but were not yet barred, referred to in the preceding section. The time allowed in such cases, then, is not to be *less* than one-half the periods of limitation in said chapter provided. And thus we see, in the second place, that the language is not that the times hereafter allowed for commencing actions in such cases, shall not be *greater* than one-half the periods of limitation herein respectively prescribed, but shall not be less. It would certainly seem, however, that if the legislature intended, in such cases, to limit the bringing of the suit to one-half the time, or, in this case, to five years, the words "not greater," or "not more," or something equivalent, would have been used, instead of the language employed. Again, we suppose that the object of this section was to prevent the application of the general rule, contained in section 1671, to causes of action which had accrued, and were not barred, without giving a reasonable time after the taking effect of the new law, within which to bring the action. And the reason and policy of such a rule we can best illustrate, by stating a case which might arise. Under the statute of 1843, every

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action on the case for slanderous words, was to be commenced within one year after the words were spoken. Under the Code, such action must be brought within *two* years. But if the cause of action arose before the taking effect of the Code, and was not barred, the plaintiff might have at least half the time fixed in the Code, that is, one year, for bringing his action. If, however, at the expiration of this one year, or on the first of July, 1852, the two years had not expired, then the right to commence the action still continued until the expiration of the full term of two years, from the time the cause of action accrued. And so in the case before us.

Upon two of the notes, under the law of 1843, the plaintiff's action would have been barred on the second, or, perhaps, the fifth day of February, 1856. The Code provides, however, that it shall not be barred until in February, 1860. If, however, the notes had been dated in June, 1845, then they would have been barred in June, 1855, but for section 1672, which, in such a case, gives half the ten years provided for in section 1659, to-wit: five years from the first of July, 1851, or until July, 1856. We think this section, (1672), was intended to provide for all causes of action accruing before the taking effect of the Code, where the period of limitation fixed before that time, was not enlarged by the provisions of section 1659. In doing so, it was necessary to establish a general rule, or one that would be applicable to all cases coming within its provisions. This rule is, that after the Code takes effect, a party shall have half the time herein, (in the Code), for commencing his action. He may have more, but he shall not be cut off with less. If, however, upon the expiration of this time, (that is, half the time), the whole period allowed by the first section of chapter 99, counting from the time the cause of action accrued, has not expired, then the party may sue at any time before that period expires. Any other construction, it seems to us, does violence to the language used, and contravenes the object and purpose of the law.

Judgment reversed.

 Nutter v. Rickets.

NUTTER v. RICKETTS.

The fact that an attorney of the party, was present at the taking of a deposition in his favor, on commission and interrogatories, where it is not apparent that the attorney prompted the witness, or in any positive manner influenced him, furnishes no ground for rejecting a deposition.

Where, in an action of trover against an officer, for the conversion of two horses, the defendant answered, alleging that he took two horses, as sheriff of D., county, from the possession of plaintiff, as the property of B., by virtue of a writ of attachment in favor of J. & S., in an action brought by them against B., and which was still pending, and that he sold the said horses as such sheriff, by virtue of the proceedings in said action; and also denying that plaintiff was the owner of said horses, and that defendant converted them to his own use; and when the defendant asked the court to instruct the jury, as follows:—

“That the plaintiff, in order to recover, must show that he owned the horses, and that the defendant converted them, or the proceeds thereof, to his own use,” which instruction the court refused, as follows:—

“Refused, because a conversion of the horses, or the proceeds, so as to deprive the plaintiff of them, would be sufficient, if the jury are satisfied that he was the owner, and entitled to the possession”: *Held*, That the gist of the instruction was, that the sheriff must convert to *his own* use, and that the instruction was properly refused.

Where, in an action of trover against an officer, for the conversion of two horses, the defendant justified under a writ of attachment against B.; and where testimony was introduced, tending to show that the plaintiff was in the employment of the owner, or owners, of a circus; that he bought one of the horses, (Young Alick), from one H.; that when the plaintiff paid the first one hundred dollars of the purchase money, he went to the clerk of the circus and obtained it; and that when he paid the balance, (one hundred and forty-five dollars), some time after, he did it by giving H. an order on the same clerk; and thereupon the defendant asked the court to charge the jury as follows: “That if the jury believe, that at the time of the sale of the spot-horse, (Young Alick), by H., the plaintiff went with H. to the clerk of the circus, and obtained from the clerk one hundred dollars, and handed it over to H., as part of the purchase money; and if the jury further believe, that at Milwaukie, the said H., got the balance, one hundred and forty-five dollars on the plaintiff’s order, through the same clerk, these are such circumstances as to warrant the jury in treating the sale, as a sale to the owner, or owners, of the circus, and not as a sale to plaintiff; which instruction the court refused to give: *Held*, That there was no error in refusing the instruction.

There is no objection, in principle, to a jury seeing an object which is

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the subject of testimony. The practice lies in the discretion of the court.

Where, in an action of trover, for the conversion of two horses, the court permitted the jury, with H., who was the person supposed to have sold one of the horses to the plaintiff, to go out and see the horse in the court yard; and where it did not appear that H. and the jury spoke together, or that any improper circumstance appeared: *Held*, That there was no impropriety in the proceeding.

Where it is sought to reverse a judgment, on the ground that the verdict is excessive, and contrary to the evidence, the whole of the testimony must be brought before the appellate court, or the objections arising from the finding of the jury cannot be considered.

Appeal from the Dubuque District Court.

THURSDAY, JUNE 10.

This was in the nature of an action of trover, for taking from the possession of the plaintiff two horses, which were his property; one of which was named Young Alick, and the other Burntside, and converting them to the defendant's use. A demand is alleged. The plaintiff also avers that the defendant sold the horses and converted the proceeds of such sale, and he claims damages in the sum of one thousand dollars. The defendant, answering, denies the claim of one thousand dollars, and says that he took the horses as sheriff of Dubuque county, from the possession, and as the property of, one Loren G. Butler, by virtue of a writ of attachment in favor of Johnson & Stephens, in an action brought by them, and which was still pending; and that he sold the said horses as such sheriff, by virtue of the proceedings in the said action. He denies that they were the property of Nutter, or that he had any interest in them, and that he, (defendant), converted them. A verdict and judgment were rendered in favor of the plaintiff in the sum of five hundred and thirty-two dollars. A motion for a new trial was overruled, and the defendant appeals. The errors assigned, and the other material facts, sufficiently appear in the opinion of the court.

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Smith, McKinlay & Poor, for the appellant.

David S. Wilson, for the appellee.

WOODWARD, J.—The first error assigned, is to the overruling a motion of defendant, to exclude the deposition of Loren G. Butler, for the reason that one of the attorneys of the plaintiff was present before the commissioner, at the time of taking the deposition, and influenced him and the witness, in a manner prejudicial to the rights of defendant; and a bill of exceptions shows that on the hearing of this motion, one of plaintiff's attorneys stated that he went to Chicago to see that the deposition was taken, and that the witness should attend, and should testify to all he knew; that he was with witness three or four days, and drank liquor with him while there, and "endeavored to put him up in relation to the case;" that when before the commissioner, he did not speak to the witness, nor prompt, nor suggest, any answer; and that he did not propose to witness to swear to anything that he did not know to be true; and he denied any improper conduct towards the witness. The deposition was taken by commission and interrogatories.

We do not perceive, in this, a substantial ground for setting aside the deposition. The mere fact that plaintiff's attorney was present at the taking, does not seem to be a sufficient reason. If it appeared that he prompted or suggested, or that he in any positive manner influenced the witness or the officer, it might be different. But we cannot suppose that his mere presence, had so strong an influence as to affect the testimony; and the previous matter resolves itself into acquaintance and intimacy, and would form an equal objection to all depositions where the attorney of a party and the witness, held the same social or convivial relations. Until something specific is shown, we must presume the witness capable of taking care of himself, and of speaking the truth equally with others. We do not think sufficient is shown to warrant the objection to the deposition. And another reason exists

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for the same conclusion. The deposition is not among the papers of the case, and it does not appear that it contained material testimony affecting the case, so that the party making this motion, does not show that he has received detriment from it.

The next alleged error arises upon the refusal of certain instructions asked by the defendant. The first of these was: That plaintiff, in order to recover, must show that he owned the horses at the time of the levy, and must farther show that the defendant converted the horses, or the proceeds thereof, to his own use. To this instruction, the court has added this note: "Refused, because a conversion of the horses or proceeds, so as to deprive the plaintiff of them, would be sufficient, if the jury are satisfied that he was the owner, and entitled to the possession." The instruction thus requested, would seem to be plain, and the refusal of the court not very intelligible, without the aid of some other portions of the case. Thus the above first instruction, in its meaning and intent, is explained by the second, which requested the court to instruct that a sale made by the sheriff upon an attachment, and a return of the proceeds into the office of the clerk of the court, is not a conversion to his own use. From this it appears, that the gist of the first one was, that he must convert *to his own use*. This is the only construction that gives meaning to the explanation of the court, and this we must take to be the understanding of the court and the parties on the trial, and under this view there was no error.

The defendant also assigns as error, the refusal of the court to give the third instruction asked by him. To understand this, some farther facts are necessary to be stated. Testimony was introduced, tending to show that Nutter was in the employment of the owner, or owners, of a circus; that he bought the horse, Young Alick, from one Horton; that when he paid the first hundred dollars of the purchase money, he went to the clerk of the circus

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and obtained it; and that when he paid the balance, one hundred and forty-five dollars some time after, he did it by giving Horton an order on the same clerk. The defendant claims that he bought the horse for, and was agent of, the circus company. The defendant now requested the court to instruct, "that if the jury believe that at the time of the sale of the spot-horse, (or Young Alick,) by Horton, Nutter went with Horton to the clerk of the circus, and obtained from the clerk one hundred dollars, and handed it over to Horton, as part of the purchase money; and if the jury farther believe, that at Milwaukie, the said Horton got the balance, one hundred and forty-five dollars, on Nutter's order through the same clerk, these are such circumstances as to warrant the jury in treating the sale as a sale to the owner, or owners, of the circus, and not as a sale to Nutter." The court declined giving this instruction, and in so doing were correct, as we think. The giving it would have approached too nearly to an intimation of an opinion on the testimony—so near, at least, that the refusal of it cannot be regarded as an error. The court was correct in leaving this to the jury, with the residue of the evidence. Had the order on the clerk shown that the transaction was one belonging to the owners of the circus, it is probable the defendant would have caused it to be produced.

Error is also assigned upon the circumstance that the court permitted the jury, and Horton, the witness, to go out and see the horse in the courthouse yard. Horton was the person supposed to have sold the horse to Nutter, a year and a half before; and the question was, whether this was the same one. We see no impropriety in the proceeding. It is not pretended that the witness and jury spoke together, nor that any improper circumstance occurred. There is no objection, in principle, to a jury seeing an object which is the subject of testimony. By this means, they may obtain clearer views, and be able to form a better opinion. Small articles, the subject of testimony, are not unfrequently introduced to the in-

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spection of the jury, and no reason forbids the same course in relation to larger ones, other than the practicability and convenience of so doing. The practice lies in the discretion of the court.

Finally, the defendant assigns as error, the overruling his motion to set aside the verdict, and for a new trial. A portion of the grounds of this motion, consisted in the refusal of instructions which have been noticed above, and in the other alleged error which have been considered; other grounds assigned are, that the verdict is excessive; and that it is contrary to the evidence, and against the weight of the evidence. The whole of the testimony not having been brought to this court, as was intended by the defendant, the objections arising from the finding of the jury, cannot be considered. This disposes of all the exceptions taken, which can be reached, and we find no error herein. The judgment of the district court will be affirmed.

Judgment affirmed.

STEVENSON v. BELKNAP.

A father may maintain an action for the seduction of his daughter, after she has attained her majority, if the seduction took place while she was a minor.

The attaining the age of majority by the daughter, does not take away the father's right of action; nor is it either taken away or negatived by the provisions of the statute, which gives to the unmarried female the right to prosecute an action for her own seduction.

In an action by the father for the seduction of his minor daughter, brought after the female has arrived at her majority, the damages of the father are not restricted to the loss of service, and the actual expenses incurred, but he may recover exemplary damages.

Where actions for the seduction are brought both by the father and the daughter, the jury may consider every fact which goes to the injury of the plaintiff, whether in mind, body, or estate, and may give damages commensurate with the injury sustained. In each case, the proof will be confined to the damages resulting to the plaintiff alone, and not to another, nor to the plaintiff, jointly with another.

In cases of seduction, where the female is a minor, the injury to the

6	97
98	705
6	97
108	4

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father is distinct from the injury to the daughter. They are different in character, and there is nothing incompatible, or inconsistent, in the idea of both resulting from the wrongful act of the same party.

In an action by a father, for the seduction of his minor daughter, it may be shown to the jury, in aggravation of damages, that the defendant visited the daughter as a suitor, and used arts, flattery, persuasion and promises, to induce her to have connection with him.

In such an action, damages may be given, not only for the loss of services, and actual expenses incurred, but also, on account of the wounded feelings of the plaintiff, and his anxiety, as the parent of other children, whose morals may be corrupted by the example.

Where, in an action by a father, for the seduction of his minor daughter, the defendant asked the court to instruct the jury as follows: "That if the daughter was a minor at the time of the seduction, and the suit was not brought by the father during her minority, that then the right of action was in the daughter alone, and the action cannot be maintained by the father," which instruction was refused by the court: *Held*, That the instruction was properly refused.

Appeal from the Jones District Court.

THURSDAY, JUNE 19.

This was an action by the plaintiff to recover damages for the seduction and debauching of his daughter, by defendant. Exception was taken on the trial to instructions given to the jury, by the court, at the request of the plaintiff, and to the refusal of the court to give certain instructions asked by defendant. The jury found for the plaintiff, and assessed the damages at \$3,000. Defendant appeals. The instructions will be found sufficiently stated in the opinion of the court.

Henry & McCarn, for the appellant.

I. The old form of action, *per quod servitium amisit*, was wholly technical in form, and was founded in legal fiction. *Clark v. Fitch*, 2 Wend., 261; *Hewitt v. Phiner*, 21 Ib., 82. This form of action has been abolished by the Code. Section 1733.

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II. Section 1696, of the Code, gives to unmarried females the right to prosecute an action for their own seduction, in their own names. This remedy is not cumulative. *Gover v. Dill*, 3 Iowa, 342.

III. Where a statute gives a remedy to redress a particular injury, no other mode can be pursued, and no other person, than those pointed out, can employ the remedy. 1 Kent Com., 517; Smith on Stat. and Com. Law, 898; 10 Johns., 389; Plowden, 206; 1 Vermont, 152; *The Newburgh Turnpike Co. v. Miller*, 5 Johns., 101; *Lessee of Moore v. Vance*, 1 Ohio, 10; *Camden v. Wright*, 24 Wend., 428.

IV. The plaintiff is limited in his recovery to the loss of service, and actual expenses incurred, and could not recover exemplary damages. *Camden v. Wright*, 24 Wend., 428; *Edmonson v. McKell*, 2 T. R., 4; *Whitney v. Hitchcock*, 4 Denio, 463; *Clarke v. Fitch*, 2 Wend., 464.

V. Exemplary damages are not allowed in any case, unless authorized by statute. 1 Murray Jury Ct. Rep., 337; 9 Law Reporter, 529; 2 Black. Com., 438; Coke Litt., 257; Soyer on Damages, 1; 2 Greenl. on Ev., 253; 4 Blackf. 277; 3 Am. Jurist, 293.

VI. The father cannot recover damages for his wounded feelings, nor for his anxiety, as the parent of other children, whose morals may be corrupted by the example.

VII. Nor can the plaintiff enhance his damages by showing that the defendant visited the house as a suitor of the daughter, and that he succeeded by means of a promise of marriage. *Foster v. Scofield*, 1 Johns., 299; *Clark v. Fitch*, 2 Wend., 465; 3 Campbell, 463; *Gover v. Dill*, 3 Iowa, 340; *Sargent v. Dennison*, 5 Cow., 116; *Martin v. Payne*, 9 Johns., 387.

Isbell, Hubbard & Stephens, for the appellee, cited the following authorities: *Boyd v. Bird*, 8 Blackf., 113; *Bedford v. McKowl*, 2 Esp. N. P., 119; *Andrews v. Askey*, 8 C. & P., 7; *Irwin v. Dearman*, 11 East., 24: 2

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Greenl. Ev., sec. 579.; Sedgwick on Dam., 542; 3 Stephens N. P., 2356; *Ackerly v. Haines*, 2 Caines, 292.

STOCKTON, J.—The questions arising under the first, second, third and fourth heads of the assignment of errors, have not been discussed by defendant, but have been abandoned by him. Our examination of the errors assigned, will be confined to those arising under the fifth and sixth specifications, and growing out of the instructions given and refused by the court.

At the request of the plaintiff, the court charged the jury, that “if the daughter of the plaintiff was a minor, at the time of the seduction, alleged in the petition, and if she was seduced and debauched, as alleged, a right of action accrued to the plaintiff at the time of the seduction.” The defendant, on the other hand, asked the court to charge, that “if the daughter was a minor at the time of the seduction, and the suit was not brought by the father for the injury during her minority, that, then, the right of action was in the daughter alone, and the action cannot be maintained by the father.” This instruction asked by the defendant, was refused by the court. We think there was no error in such refusal, nor in giving the instruction asked by the plaintiff. The remedy is given to the father for the seduction of his minor daughter, (Code, sec. 1697), and he may maintain the action after she has attained her majority, for her seduction while a minor. The attaining the age of majority, by her, does not take away the father’s right of action; nor is it either taken away or negatived by the provisions of the statute, which gives to the unmarried female the right to prosecute an action for her own seduction. Code, sec. 1696; 2 Greenleaf’s Evidence, sec. 572; 3 Steph. N. P., 2353.

We are next to consider what facts the plaintiff may give in evidence, in aggregation of damages; and for what exemplary damages may be given. It is urged by defendant, that as the statute authorizes the daughter to sue in her own name, for her seduction, and to recover damages

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for all the injury she may have sustained, the father, in any suit brought by him, is not entitled to exemplary damages, and can only recover for the loss of service, and the actual expense of sickness. We do not concur in these views. Under the old system of pleading, the action for seduction was eminently a legal fiction: it was based upon the relation of master and servant, and upon the loss of service, in consequence of the seduction. Though the rule has, in England, been relaxed as to what damages may be allowed, yet as to the right of recovery, the English authorities still adhere to the idea on which the action is founded, and where there is no loss of service, there can be no relief. *Grinnel v. Wells*, 7 Manning and Granger, 1033. Our statute has so far swept away these fictions, as to provide a remedy, not for the father only, but for the daughter also; and not only may she prosecute an action in her own name for her seduction, but where she is, at the time of the seduction, a minor, her father, mother, or guardian may maintain an action, though she be not living with, nor in the service of, the plaintiff, and though there be no loss of service. Code, secs. 1696, 1697. The providing a remedy for the daughter, should not be construed as taking away that of the father, or as restricting his damages to the loss of service, or actual expenses incurred; especially since the relation of master and servant need not be shown to exist, and there may have been no actual loss of service proved.

Upon the question whether the father may not maintain the action, though the daughter be of full age, if living in his family, and rendering him service, we do not wish to be understood as expressing any opinion. See *Clark v. Fitch*, 2 Wend., 462; 10 Johns., 117; 5 Cow., 115.

It is urged as a further reason why the plaintiff should not recover in this action, for more than the loss of service, and actual expenses incurred, that defendant is still liable to an action for seduction by the daughter; and if the father may recover exemplary damages, it may result in their being twice claimed against him in a civil suit, and

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the defendant is in danger of being twice punished for the same injury. It is not necessary for us to inquire, at this time, what the rule of damages should be in an action by the daughter as plaintiff. If actions are brought by both the father and the daughter, we suggest that the jury may consider every fact which goes to the injury of the plaintiff, whether in mind, body, or estate; and may give damages commensurate with the injury sustained. The proof will be confined, in each case, to the damages resulting to the plaintiff alone, and not to another; nor to the plaintiff jointly with another. The injury to the father is distinct from the injury to the daughter. They are different in character, and there is nothing incompatible or inconsistent in the idea of both resulting from the one wrongful act of defendant. In the present cause, we see no good reason why the rule as to plaintiff's damages, should be changed. When the action was based upon the mere loss of service, the damages were very much at large, and in the discretion of the jury; and exemplary damages might always be given. *Ingersoll v. Jones*, 5 Barb., 661; Sedgwick on Damages, 542. Much more may exemplary damages be now given, when the jury are to look, not to the loss of service, but to the damages resulting from all that the father can feel, from the nature of the injury.

The court charged the jury, that "if the defendant visited the daughter of plaintiff as a suitor, and used arts, flatteries, persuasions, and promises of marriage, to induce her to have connection with him, these facts may be considered by them in aggravation, and to increase the plaintiff's damages." We think there was no error in this instruction. The objection taken to it by defendant, that plaintiff was not entitled to give in evidence a breach of promise of marriage, in order to enhance the damages, is made under a misapprehension of the language and tenor of the instruction. The language does not necessarily refer to a promise of marriage, nor to a breach thereof by defendant. No proof of such promise was sought to be given to the

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jury. The law is well settled, as claimed by defendant, that no evidence can be given of any such promise either as the basis of the action, or the measure of damages. It is permitted, however, to ask the daughter, whether the defendant was paying his addresses to her in an honorable way. *Dodd v. Norris*, 3 Campbell, 319. And plaintiff may give in evidence the terms on which defendant visited his house, and that he was paying his addresses to the daughter upon the promise, and with the intention of marriage. *Elliott v. Nicklin*, 5 Price 641; *Gullidge v. Wade* 3 Wils., 18; *Capron v. Balmond*, 3 Steph., N. P. 2356; Greenleaf Ev: sec. 519.

In *Dover v. Dill*, 3 Iowa, 337, which was an action by the female to recover damages for her seduction, it was held by this court, that it was not sufficient for the plaintiff to show alone that defendant had sexual intercourse with her; but she must show that he had accomplished his purposes by some promise or artifice, or that she had been induced to yield to his embraces by his flattery, or deception. If, without being deceived, and without any false promises, deceit or artifice, she voluntarily submits to the improper connection, the law affords her no remedy. Upon these considerations, the court held, that when offered with a view of showing the manner in which the defendant accomplished his purpose, there was no error in suffering plaintiff to prove a promise of marriage. We believe that all the authorities concur, that seduction is generally made out by a train of circumstances; among which may be enumerated, courtship, or continued attentions for a length of time, and the practice of arts and managements, promises and persuasions, calculated to deceive and mislead the too confiding female.

The court further charged the jury, that "damages may be given, not only for the loss of service and actual expenses, but also on account of the wounded feelings of the plaintiff, and his anxiety as the parent of other

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children, whose morals may be corrupted by the example.' It is contended by defendant, that the charge of the court enlarges the measure of the plaintiff's damages to an extent not warranted by the authorities; and, while it is conceded he may recover for the wounded feelings, yet it is urged that he cannot recover for anxiety of mind caused him as the parent of other children, whose morals may be corrupted by the example set before them in the family. This question may be considered as long since settled, on the authority of Lord Eldon, while chief justice of the common pleas, in the case of *Bedford v. McKnowl*, 3 Espinasse N. P. 119. "In point of form, (he says), the action only purports to give a recompense for loss of service; but we cannot shut our eyes to the fact, that this is an action brought by a parent for an injury to her child; in such case, I am of opinion that the jury may take into consideration, all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort, as well as the services of her daughter, in whose virtue she can feel no consolation; and as the parent of other children, whose morals may be corrupted by her example." So, in *Clarke v. Fitch*, 2 Wendell, 461, Savage Ch. J. says: "The action is supported, not so much to remunerate in damages for the loss of service and expenses incurred, "as to punish the offender for his dishonorable and disgraceful conduct, by way of atonement for the injury inflicted upon the subject of his seductive arts, and upon her parents and their family." See, also, *Grabe v. Margrave*, 3 Scam, 373.

The old idea of the loss of menial services, which lay at the foundation of the action, has gradually given way to more enlightened and refined views of the social relations. The services of the child are not regarded as alone of value to the parent. The society and attentions of a virtuous and innocent daughter, are come to be properly appreciated; and the loss sustained by the parent from the corruption of her mind, and the defilement of

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her person, by the guilty seducer, is considered ground for damages consistent even with the first principles of the action. *Hewitt v. Prime*, 21 Wendell, 82. It was held by Lord Eldon, in *Chambers v. Irwin*, (1800), cited in note to *Andrews v. Askey*, 8 Carr and Payne, 7, that the jury were to look not merely to the loss of service, but to the *wounded feelings* of the party; and by Lord Ellenborough in *Southernwood v. Ramsden*, (1805,) that damages may be given for the loss which the father sustains by being deprived of the *society and comfort* of his child, and by the *dishonor* which he had received. 8 Carr and Payne, *supra*, and Sedgwick on Damages, 542. The same learned judge held, that where the plaintiff had adopted and bred up the daughter of a friend and comrade, from her infancy, standing as he did to her in the relation of parent, he was entitled to recover damages beyond the mere loss of service, aggravated in this instance by the injury done to the object on whom he had placed his affections. *Irwin v. Dearman*, 11 East., 23. In *Andrews v. Askey*, 8 Carr and Payne, 7, the jury were directed, that they might give damages for the *distress and anxiety* of mind felt by the plaintiff; and in Illinois it has been held, that the jury may award him compensation for the *dishonor and disgrace* cast upon him and his family, and for being deprived of the society and comfort of his daughter; the court saying that "in vindictive actions—and this is now regarded as one—the jury are always permitted to give damages, for the double purpose of *setting an example, and punishing the wrong doer.*" *Grabbe v. Margrave*, 3 Scam., 373.

As to the rule of damages by which the jury are to be governed in making up their verdict, we remark, as before, that the damages are very much in the discretion of the jury; where the act of seduction is proved, all the aggravating circumstances that follow, come in by way of increasing the damages. *Hewitt v. Prime*, 21 Wendell, 82. We think the court did not err in charging that the defendant's attentions to the daughter as a suitor, and the arts,

Phares v. Walters.

flatteries, persuasions and promises, made use of by him to accomplish his ends, may be taken into consideration by the jury in estimating the damages. These go to make out, not merely the fact of seduction, but the guilty motive of the act, which enters so largely into the question of damages, and which may influence, to so great an extent, the verdict of the jury, where, as in this action, they are permitted to give as damages more than simple compensation for the actual injury sustained. As resulting from the difficulty in laying down any fixed rule of damages, it has been held, that the action for seduction is exempted, by peculiar considerations, from the interference of courts, on the ground of excessive damages; and unless under extraordinary circumstances, as where the verdict is so great as to raise the suspicion of partiality or passion, the finding of the jury will not be disturbed. It is their judgment, and not that of the court, which is to determine the amount of damages. *Sargent v. Dennison*, 5 Cowen, 106; *McConnell v. Hampton*, 12 Johns., 257; *Walker v. Smith*, 1. Wash., sec. 152.

Judgment affirmed.

PHARES v. WALTERS.

Courts of equity exercise a general concurrent jurisdiction with courts of law, in the assignment of dower, in all cases.

Where the jurisdiction is concurrent, courts of equity, equally with courts of law, are bound by the statute of limitations; and they act in obedience to the statute, rather than by way of analogy to the law.

Where in a chancery proceeding, the bill states a case within the statute of limitations, the objection may be taken in a defence by demurrer.

If a complainant in chancery, be within any of the exceptions of the statute of limitations, it is his duty to state it in his bill.

An action to recover dower is included within the general statute of limitations, (chapter 99 of the Code), and will be barred in the same time with other actions for the recovery of real property.

It was the intention of the legislature to make the statute of limitations (chapter 99 of the Code), retrospective.

Section 4672 of the Code was intended to apply to causes of action

6	106
81	719
6	106
83	530
6	106
118	583
6	106
132	441

Phares v. Walters.

accruing before the Code, and not then barred, where the period of limitation is enlarged; and in such cases, whether the right of action, (if on a promissory note), had accrued one day, or five years, the party is entitled to *at least* five years, after the Code took effect, in which to commence his suit, and as much longer as would make ten years from the time the right of action accrued.

So, section 1673 applies to those cases where the period is not enlarged by the Code; and under it, (in actions for the recovery of real property), a party is confined to twenty years from the time the cause of action accrued, if it accrued before the taking effect of the Code; but if such twenty years would run beyond ten years from July 1, 1851, it is not to so run, but would expire July 1, 1861, and as much short of that time as, counting from the period the right of action accrued, for twenty years, it would fall short.

Action for the recovery of dower, commenced October 2, 1857. The petition alleged that the death of the husband took place October, 1842. Demurrer to the petition, on the ground that upon the facts stated therein, the petitioner's claim was barred by the statute of limitations. Demurrer overruled: *Held*, That the demurrer was properly overruled.

Appeal from the Lee District Court.

THURSDAY, JUNE 10.

The petitioner, as the widow of Johnson J. Phares, claimed dower in a lot in the town of Fort Madison. The husband died, October 22, 1842, and this action was commenced October 2, 1857. Defendant demurred to the petition, for the reason that upon the facts stated therein, petitioner's claim was barred by the statute of limitations. This demurrer was overruled, and defendant appeals.

J. M. Beck, for the appellant.

I. The statute of limitations may be taken advantage of upon demurrer, where such objection appears upon the petition. Story's Eq. Plead., sec. 484; *Parson v. David*, 1 Iowa, 33.

II. The first question for consideration is, is the action which may be brought to recover dower in Iowa, within the provisions of the statute of limitations. Statutes of

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limitations, so far as they are noticed by the books, may be divided into two classes: 1. Those statutes which operate to protect the defendant, or the party in possession of land, against all actions, or certain specified actions, brought against him after a fixed time, by declaring that possession for such time, vests the full and perfect title to the lands. 2. Those which operate upon the plaintiff—the one seeking by suit to recover the land—by prohibiting him from recovering after a specified time. Of the first class are the statutes of New Jersey. 2 Hilliard on Real Property, 178, sec. 58; Appendix to Angell on Limitations, third edition, 1, xxii. And of South Carolina: 2 Hilliard on Real Property, 181, sec. 70; Angell on Limitations, Appendix to third edition, xcv. Dower is barred by the statute in New Jersey: *Berrion v. Conover*, 1 Harrison, 107; Angell on Limitations, 441. So, in South Carolina: *Ramsey v. Dogen*, 1 Constitutional Rep., 112; *Boyle v. Rowand*, 3 Dessaussure, 555; 4 Kent's Com., 70. Of the second class may be included the following: The English statutes, 35 Henry 8, sec. 2; Angell on Limitations, Appendix third ed., i; 21 Jac., 1, ch. 16; Angell on Limitations, Appendix, third ed., iii. New Hampshire: Angell on Limitations, Appendix, third ed., xiv.; 2 Hilliard on Real Property, 177, sec. 53. Maryland: Angell on Limitations, Appendix, third ed., 1, xxxi.; 2 Hilliard on Real property, 179, sec. 61. North Carolina: Angell on Limitations, Appendix, third ed., xcii; 2 Hilliard on Real Property, 179, sec. 63. Georgia: Angell on Limitations, Appendix, third ed., xcix; 2 Hilliard on Real Property, 180, sec. 65. Massachusetts: Angell on Limitations, Appendix, third ed., xixii; 2 Hilliard on Real Property, 175, sec. 50. The American statutes, in this class, follow the English statute of 32 Henry 8, or 21 James 1. As to the English statutes, they provide that no right of entry, nor certain forms of action—ejectment, formedon, &c.—can be brought, unless within a certain time. They use such technical words, and so prescribe the form of action, that they very properly are construed not to bar actions which

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may be brought to recover dower, upon the grounds and for the reasons I have given. Dower is barred by the statute in New Hampshire, Massachusetts and Maryland. *Barnard v. Edwards*, 4 New Hamp., 107; *Parker v. Obear*, 7 Metcalf, 24; *Wells v. Beal*, 2 Gill and Johnson, 468. Dower gives no right of entry at common law, until after assignment. Coke on Littleton, sec. 39; 1 Hilliard on Real Property, 183. Writs of ejectment, which are based on entry and ouster, will not lie for dower. Adams on Ejectment, marg., page 68, fourth Am. ed., 25. Nor will writs of formedon, which are brought by the issue in tail, or the one having the reversion or remainder of an estate. Coke on Littleton, sec. 595. Nor, in fact, will any other common law possessory writ lie, for they are all based on entry and seizin. The proper form of writ to recover dower, is "a writ of dower *unde nihil habet*," or a "writ of right of dower." 2 Bacon's Abridgement, 756; 1 Hilliard's Real property, 168, secs. 30 and 31. These common law writs for the recovery of dower, are not within the statute of 32 Henry 8, or 21 Jas. 1; nor of any of the statutes above named. Neither is dower recovered in any of those States, by any writ or form of action that is within the statutes; 1 Hilliard's Real Property, 172, sec. 52, and *seq.* pages 173, 4, 5, 6, and 7.

The statutes of Ohio and Iowa belong to the second class in the division I have made, but they differ widely from the English and American statutes above noticed, as they bar all actions brought to recover any title or interest in lands, after the expiration of the times therein respectively fixed. In Ohio, it is held that actions to recover dower, are within the statute. *Tuttle v. Wilson*, 10 Ohio, 24; 2 Hilliard's Real Property, 181, sec. 70; Angell on Limitations, App. third ed., cxxi; Code, sec. 1659, part 4. I conclude that any action to recover dower, is within the statute of limitations, and will be barred thereby.

III. Within what time will the statute of Iowa bar a recovery for dower? Code, chap. 99, 244. There is a little obscurity in sections 1671, 2 and 3 of the Code, but

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they will be readily comprehended, with a little care. Section 1672 qualifies section 1671, and provides that in all cases arising before the Code, the time shall run after the Code for one-half the time therein fixed. Section 1673 qualifies this qualification; so that the time fixed by the Code, in cases where the time now is not greater than it was formerly, shall not exceed the time fixed by the law in force before the Code. The only cause of confusion in the mind, in reading this section is, that we may give the word "greater" the force of two words, "greater or less." This section, it will be observed, does not provide that the time "shall in no case be *less* than before the Code," but that it shall not be greater, in cases where it is not enlarged by the Code. It is not enlarged in actions to recover land, and as this section, (1673), is only a qualification on the preceding one, to prevent the time from being greater than that limited before the Code, in case of an enlargement thereof by the Code, it has nothing to do in limiting or qualifying the two preceding sections, in their application to actions for land.

The statute of limitations in force before the Code, (Rev. Stat. 1843, chap. 94, 385), is similar to the English statutes, and did not bar recovery of dower. Therefore, the time under the Code is not an enlargement of the time fixed by the old law. Section 1673 of the Code is not to be considered, in determining the time as at present limited. Section 1659, part 4, limits the recovery of real estate to ten years; the cause of action in this case, accrued in 1842. At the expiration of five years from the first of July, 1851, (when the Code took effect), this cause was barred.

IV. Chancery has concurrent jurisdiction with law in cases for dower: 4 Kent's Com., 72; 1 Hilliard on Real Property, 170; 1 Story's Com., 624. Statutes of limitation are followed and obeyed by courts of chancery, particularly in those cases where there is a remedy both in law and in equity. 2 Hilliard on Real Property, 174; 2 Story's Eq., 1520; *Wright v. Le Claire*, 3 Iowa, 227;

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Miller v. McIntire, 6 Peters, 65. Section 1397 of the Code, limits the recovery of dower in the form of admeasurement to ten years. For construction of statutes of limitations, Angell on Limitations, sec. 23. As to right of dower to possession, 1 Hilliard on Real Prop., 163. As to adverse possession of dower, 1 Hillard on Real Prop., 86, and 176, 7, Tomlin's Law Dictionary.

Rankin, Miller & Enster for appellee. [No brief of counsel for appellee was found upon the files.]

WRIGHT, C. J.—The result of the various decisions, as recognized by Story, J., is, that courts of equity exercise a general concurrent jurisdiction with courts of law in the assignment of dower, in all cases. Eq. Jur., sec. 624. In such cases, (where the jurisdiction is concurrent), courts of equity, equally with courts of law, are bound by the statute of limitations; and they act in obedience to the statute, rather than by way of analogy to the law. *Wright v. Le Claire*, 3, Iowa, 221. And in the same case, it is said, that while cases of account, of fraud, of partition, of dower, and the like, might be brought in either jurisdiction, yet the statute of limitations applied in one court, as well as in the other. In *Pierson v. David et al*, 1, Iowa, 23, it was also settled, that where in a chancery proceeding, the bill states a case within the statute of limitations, the objection may be taken in defence by demurrer; and that if the complainant be within any of the exceptions of the statute, it is his duty to state it in his bill.

In the case before us, the petition avers that the husband died on or about the 22d of October, 1842; "that during coverture with petitioner, he was seized in fee simple, and as of an estate of inheritance, of the following lot, (describing it); that at the present time, this interest is vested in the defendant; that she never, in any way, connected herself with any conveyance to defendant, or any other persons; that upon the death of her husband,

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she became, and still is, entitled to her dower in said premises; and that during all this time, said lot has been worth a rent of seventy-five dollars per annum, no part of which has ever been paid her. She therefore asks that defendant be required to account to her for the rents, issues and profits, which have accrued since the death of her husband, and be decreed to pay her one-third of the amount thereof; that a partition be ordered, which shall secure to her one-third in value of said lot, with all the rents, issues and profits, to be by her had, received, and enjoyed for her sole and separate use, for and during her natural life; and for such further relief as may be decreed just and equitable."

That this petition must be considered as addressed to the chancellor, we think is quite clear. And that this is its character, does not appear to be seriously controverted by counsel for appellee; but his first position is, that the defence of the statute of limitation, cannot be made by demurrer, but must be set up by way of answer or plea, or both. We have already seen, however, that the rule is otherwise in chancery; and we, therefore, proceed to inquire, whether complainant's action was barred at the time of the commencement of this suit.

It is conceded by appellant, that the statute of limitations in force in this state, prior to the adoption of the Code, was similar to the English statutes of 32 Hen. 8., ch. 2, and 21 Jac., 1. ch. 16., and that it did not bar an action for the recovery of dower. And from the nature and character of the action, text-writers have laid down the general rule, that such statutes do not bar dower, unless they contain language which brings it plainly within their meaning and scope. 4 Kent, 70.

The language of the Code is, that actions for the recovery of real property, may be brought within ten years after the cause of action accrued, and not afterwards; section 1659. Taking this section, in connection with the definition of "real property", as given in section 26, which is, that it includes lands, tenements, and heredita-

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ments, and all rights thereto, and interests therein, equitable as well as legal, and it would seem to follow, that an action to recover dower, was included within the general statute, and would be barred in the same time with other actions for the recovery of real property. And thus treating the subject, appellant insists that sections 1671, 2 and 3, when properly construed, with reference to causes of action accruing before the taking effect of that Code, and not then barred, do not aid the claimant, but are conclusively in his favor.

These sections are, in substance, that the provisions of the chapter, (including section 1659), are intended to apply to causes of action which had already accrued, and were not yet barred, subject to certain regulations, which are: *First.* That the times hereafter allowed for commencing actions in such cases, shall not be less than one half the periods of limitation herein respectively prescribed, except—*Second.* That where the period of limitation heretofore fixed by statute, is not enlarged by section 1659, the time allowed for the commencement of a suit, shall, in no case, be greater than that fixed by the law heretofore in force, as applied to such cases. We have had some difficulty in giving a satisfactory construction to these sections, but have finally concluded that their meaning, as applied to the case before us, is in substance this: It was the intention of the legislature to make the act retrospective, and hence, it is expressly declared that the provisions of the chapter are intended to so apply. To prevent the hardship and injustice which might result from so general and sweeping a clause, and not at once to destroy a right which existed under the old law, certain regulations were given. One regulation is, that if the period of limitation heretofore fixed, (or fixed by previous statutes), is *not enlarged*, then the Code is not to be so construed as to give a longer time than that fixed by such previous law or statute. Thus, if the former period was twenty years, and by the Code it is reduced to ten years, and seventeen years had run before July 1, 1851, the cause of action

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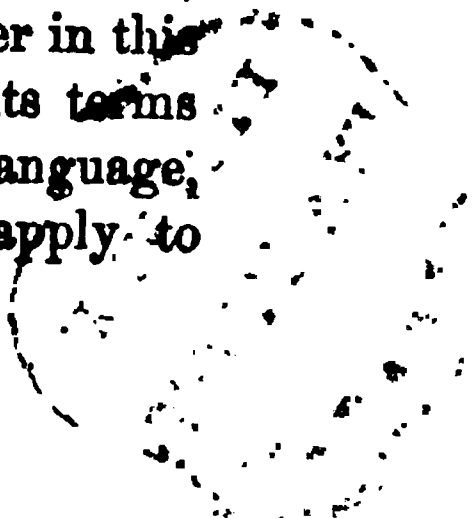
would be barred July 1, 1854. In other words, as twenty years was the time within which it should have been commenced by the law heretofore in force, it was not intended, by anything contained in the Code, to increase that time. In the case before us, we have seen, that there was, before the Code, no period of limitation fixed by statute; and it is, therefore, clearly one of those cases where the period is not enlarged. It is equally clear that, within the meaning of section 1673, it is not barred by any law heretofore in force, for there was none applicable to such cases.

It thus seems to us, that we must ascertain whether any other regulation contained in these sections is applicable, and what that regulation is. Let us look at section 1672, which is, "the times hereafter allowed for commencing actions in such cases, (having reference to causes of action which had accrued, and were not barred, before the taking effect of the Code), *shall not be less than one-half the periods* of limitation herein respectively prescribed." In the case before us, as we have already seen, the period prescribed is ten years, and one-half of that time, counting from the taking effect of the Code, would expire July 1, 1856. But the material question is, what are we to understand by the words, "not less than one-half the periods," &c.? On the one side, it is claimed, that in no case can a party, after the Code took effect, have more than one-half the periods respectively prescribed in sec. 1659, but that he may be confined to less, in that class of cases where the period, by the Code, is not enlarged; and where the unexpired time, under the old law, is less than one-half the period fixed by the new. On the opposite side, the position is, that a party is entitled to at least one-half, but not necessarily confined to it. Those maintaining the latter position, admit that it was not intended to extend the time for commencing actions, where the period is less, as fixed by the new, than it was under the old law. But as applied to actions for the recovery of real property, the construction claimed, as we understand it, is this: The law heretofore in force in such cases, fixed the period for

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commencing actions at twenty years—the Code fixes it at ten years. If sixteen years had run before the Code, then only four years would be allowed afterward; if nineteen, then one; if fifteen, then five. But if less than fifteen, then the action might be brought at any time before the expiration of twenty years from the time the cause of action accrued, provided that not more than ten, of the twenty years, should elapse after July 1, 1851, or the taking effect of the Code. Thus, if fourteen years had elapsed, before the taking effect of the Code, then six years would run after; if thirteen, then seven; if eleven, then nine; if ten, then ten; if nine, then ten; if one, then ten; but in no event can more than ten years be allowed to run after the taking effect of the Code.

The case of *Bennett v. Bevard*, ante, 82, arose upon a promissory note, and it is there held, that while in such a case, a party is entitled to at least five years, after the Code took effect, within which time to commence his action, he is not necessarily so confined, if the ten years from the time the cause of action accrued, would extend it beyond the five years. And this conclusion was mainly deducible from the language of section 1672; for if it had been the intention to limit the right of action to the five years, it clearly seems to us, that the legislature would have used language more appropriate to express that intention. How easy would it have been to have said, that “the times hereafter allowed for commencing actions in such cases, shall not be *more* than one-half,” &c. And could the law-making power more clearly express the opposite intention, than by the use of the words, “shall not be less”? It seems to us, that not until we can say that *less* means *more*, would we be justified in saying, that a party is confined to the five years after the Code took effect. Thus viewing the law, we are brought to the conclusion, that the demurrer in this case, was properly overruled. Section 1672, in its terms applies to all actions, and but for the concluding language, and reference to the succeeding section, would apply to



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cases where the former periods are not enlarged, as well as to where they are. But section 1673 gives the rule, where the periods are not enlarged, and that is, that it shall not be greater than that fixed by the previous law, even if the period running under the Code shall be less than one-half the periods prescribed for such respective actions by section 1659. If, however, to make the period under the old law, it shall run beyond half the periods so prescribed, such term is to be allowed; provided, that not more than ten years, in any event, shall run after the taking effect of the Code. Our conclusion, then is, that section 1672 was intended to apply to causes of action accruing before the Code, and not then barred, where the period of limitation was enlarged; and that in such cases, whether the right of action, (if on a promissory note), had accrued one day or five years, the party was entitled to at least five years, after the Code took effect, and as much longer as would make ten years from the time the right of action accrued. We further conclude, that section 1673 applies to those cases where the period is not enlarged by the Code, and, that under it, (in actions for the recovery of real property), a party is confined to twenty years from the time the cause of action accrued, if it accrued before the taking effect of the Code; but if such twenty years would run beyond ten years from July 1, 1851, it is not to so run, but would expire July 1, 1861, and as much short of that time as, counting from the time the right of action accrued, for twenty years, it would fall short. Thus, to illustrate: the complainant's right of action accrued October 22, 1842, and counting the full twenty years, (supposing that to be the period applicable to her case), it would have been barred October 22, 1862; but, under the Code, it would be barred July 1, 1861. If it had accrued October 22, 1850, then it would have been barred at the same time, or July 1, 1861. If it had accrued October 22, 1840, or October 22, 1838, then it would have been barred before July 1, 1861, or in October, 1860, or in October, 1858.

In conclusion, we may say, that we have found great

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difficulty in giving a construction to the provisions of the Code under consideration, and quite as much difficulty in expressing, in a clear manner, the construction which, in our opinion, they should receive. The construction given, if not in all respects satisfactory, is, to our minds, more so, and more in harmony with the language used, than the opposite one.

The order overruling the demurrer in this case, is therefore affirmed.

Decree affirmed.

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95	493

6	117
137	571
137	572

A defendant's rights may be seriously compromised by his being compelled to go to trial upon an indictment charging more than one offence; and the fact that the defendant has pleaded not guilty, to the whole indictment, is not sufficient to deprive him of the right to compel the prosecutor to elect on which charge he will proceed to trial.

In such a case, the court should permit the defendant to withdraw the plea, for the purpose of filing a motion to direct the prosecutor to elect on which of the offences charged in the indictment, he will proceed to trial.

Where an indictment contained three counts, the first two of which charged that the defendant leased a house, knowing that the lessee intended to use it as a place, or resort, for the purpose of prostitution and lewdness, and the third charged him with letting it in like manner, and knowingly permitting such lessee to use the same for such purpose: *Held*, That the indictment did not charge two distinct offences.

In a criminal case, the State is not confined to the witnesses upon whose testimony the charge is founded, and whose names are endorsed on the indictment.

Section 2913 of the Code, which provides that the names of the material witnesses for the State, examined before the grand jury, must be endorsed upon the indictment, is not to be extended beyond its actual provision; and does not go to the extent, that the State cannot introduce witnesses discovered subsequently to the finding of the indictment.

The law makes no distinction between the act of letting a house for the express purpose of prostitution, and the letting of it for a proper purpose, and afterwards knowingly permitting it to be used for the pur

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pose of prostitution; and if a party knowingly permit the lessee to use the premises for such illegal object, he is liable under section 2712 of the Code, although, at the time he leased them, he did not know they were to be so used, and did not lease them for that purpose.

Where the defendant is charged with knowingly permitting his house to be used for the purpose of prostitution and lewdness, it must be shown that he did some act, or made some declaration, affirmatively assenting to the premises being so used, after he had knowledge that they were being used for such illegal purpose.

Mere inactivity on the part of the defendant, or a failure to take some steps to prevent the illegal use, is not permitting it, in the sense contemplated by the statute. An affirmative assent is necessary.

Where, on the trial of an indictment, charging the defendant with letting a house for the purpose of prostitution and lewdness, and with knowingly permitting it to be so used, the court instructed the jury as follows: "That mere inactivity on the part of the defendant, or failure to take some steps to prevent the illegal use, is not permitting it, in the sense contemplated in the law; that an affirmative assent was necessary; that to make defendant liable, there must be, on his part, a consent to such use, either expressly given, or given by his silent acquiescence; that a mere failure to interfere, or to prosecute, so as to prevent the illegal use, cannot be construed to amount to a permission, or into a silent affirmative acquiescence in such use; and that if the jury find from the evidence, that the defendant did, by any act or declaration, affirmatively assent to the premises being so used, after he had knowledge of the purpose for which they were used, he is guilty as charged;" and where the jury, after being out some hours, came into court and stated, "that there was some trouble, as to whether the defendant should have assented to the fact charged, to the person occupying the house, or whether it could be done to any other persons," whereupon, the jury were instructed as follows; "That it is not necessary that defendant should have told the lessee, that he consented to the same being used for the illegal purpose; that consenting to a thing is the result of our own mind; that all that was necessary was to find that defendant actually consented; that the assent was the result of his own mind, and need not be coupled with any other person; and that in order to ascertain the assent, the jury must find that the defendant did some affirmative act, or made some declaration, in connection therewith, or in relation thereto, from which the jury may find that the defendant did so assent: *Held*, That while one or two sentences of the latter instruction are somewhat ambiguous, yet that the concluding words distinctly hold, that the jury must find that the defendant did some affirmative act, or made some declaration, from which to conclude his assent; and that the instruction could not tend to mislead the jury.

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Appeal from the Des Moines District Court.

THURSDAY, JUNE 10.

The defendant was indicted under section 2712 of the Code, which enacts, that if any person let any house, knowing that the lessee intends to use it as a place or resort for the purpose of prostitution and lewdness, or knowingly permit such lessee to use the same for such purpose, he shall be punished as therein provided. The indictment consisted of three counts, the first two of which charged the defendant with letting the house, knowing that the lessee intended so to use it. The third charged him with letting it in the like manner, and also further charged, that having so let the same, he afterward, from the fifth day of June to the first day of February, 1857, knowingly did permit the lessee so to use the same. A jury found the defendant not guilty on the first and second counts, and guilty on the third. A motion in arrest, and for a new trial was overruled. The defendant appealed, and assigns for error the matter stated in the opinion of the court.

C. Ben Darwin and *J. C. Hall*, for the appellant.

Samuel A. Rice, (Att'y General), for the State.

WOODWARD, J.—The defendant moved for a rule on the prosecuting attorney, directing him to elect on which of the offences charged in the indictment, he would proceed to trial; which motion was overruled. A bill of exceptions shows, that when this motion was made, the plea of not guilty had been filed, which defendant asked leave to withdraw, in order to file the motion, but that the court refused leave, upon which the defendant made the motion, notwithstanding the pendency of the plea. A defendant's rights may be seriously compromised by his being com-

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pelled to go to trial, upon an indictment charging more than one offence, and we do not think that his having pleaded, is sufficient to deprive him of the right to an election by the prosecutor, but the court should have permitted him to withdraw the plea for that purpose. And, in truth, no incongruity is perceived, in his being permitted to require the election, while the plea of not guilty is pending, for if that plea is pleaded to the whole indictment, it would still be a good plea to such charge as should remain, after the election. However, it is not essential to determine whether this is a sufficient ground to reverse, for other and more important questions arising. But it does not appear clearly, whether the court overruled the motion upon the above ground, or because the indictment was held not to contain two offences. If it was upon the latter reason, we are inclined to think the court did not err. It is often difficult to determine whether a statute describes different offences, or one and the same. It has been held, that when an act provided a punishment for every person who should buy, receive, or aid in the concealment of, stolen goods, it described only one offence, the guilt of which might be incurred by either buying, receiving, or aiding to conceal; and if any indictment alleged all three of these jointly, no objection could be taken to it, as multifarious, though it might equally have charged but one. *Stevens v. Commonwealth*, 6 Met., 241; Bishop Cr. Law, sec. 535, *et seq.*; and if each of these, or similar acts, are alleged in separate counts, in an indictment, it is common practice for a jury to find a verdict of guilty upon those counts to which the evidence applied, and of not guilty on those to which it does not apply. Bishop Cr. Law, sec. 535, *et seq.*, and sec. 680, *et seq.* The identity of the evidence required to prove the offence, is not always a satisfactory test. The better one is, the power to plead a former conviction or acquittal, which, we think, applies to the present instance.

Another error assigned is, that the court permitted a witness to testify in chief, whose name was not indorsed

on the indictment. The bill of exceptions shows, that the witness had not been before the grand jury, and was not one of those upon whose testimony the indictment was found; and the case is, therefore, different from that where the witness was one of this class. The question presented is, whether the prosecution is confined to the witnesses upon whose testimony the charge is founded, and whose names are indorsed. We think it is not. Such a rule would greatly embarrass the administration of justice in the punishment of offences. It would make it necessary for the State to search for all possible evidence, before it presented an indictment, and thus favor the escape of the guilty; or it would deprive it of much evidence, and even of that which is the best and the most satisfactory. There is no principle of law, or of natural right, which entitles a defendant to a previous knowledge of all the witnesses to be called against him. Our statute has gone sufficiently far, probably, in giving him the knowledge of those upon whose information the charge is based, by requiring their names to be indorsed upon the indictment. How far, and by what consequences, this is to be peremptorily enforced, we do not decide. The cases of *Ray v. The State*, 1 G. Greene, 316, and *Harriman v. The State*, 2 G. Greene, 272, touch upon the question, but do not go far toward settling the law. We are of the opinion that the statute is not to be extended beyond its actual provision, which is, that the names of the material witnesses examined before the grand jury, should be indorsed. This may be supposed to give the accused the knowledge of all the witnesses known to the prosecution, and it is difficult to consider him entitled to more than this. We cannot go to the extent of holding, that the State cannot introduce testimony discovered subsequently to the finding of the bill.

The remaining error assigned is to the giving instructions, which were, in substance, the following: That the law makes no distinction between the act of letting a house for the express purpose of prostitution, and the letting it

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for a proper purpose, and afterward knowingly permitting it to be used for such purpose; and, that if the jury find that the defendant let the premises, knowing the lessee intended to use them for the alleged purpose; or if the jury believe the defendant knowingly permitted the lessee to use them for such purpose, he is guilty as charged in the indictment, although, at the time he leased them, he did not know they were to be so used, and did not lease them for that purpose. The question raised here, is the same with that made upon the motion for the prosecution to elect upon which offence it would proceed; that is, whether there are two offences charged; and as we have held that there was no error in that decision, it follows that, in our opinion, there is none in these instructions.

Another error alleged, is to certain instructions given by the court, to arrive at which, and their bearing, it becomes necessary to set out the substance of several which were given. In the principal instructions, the court charged, that "mere inactivity, on the part of the defendant, or failure to take some steps, to prevent the illegal use, is not permitting it, in the sense contemplated in the law. An affirmative assent is necessary; and if the jury find by the evidence, that the defendant did, by any act or declaration, affirmatively assent to the premises being so used, after he had knowledge of the purposes for which they were used, he is guilty, as charged." And further, that "to make defendant liable, there must be, on his part, a consent to such use, either expressly given, or given by his silent acquiescence." And again: that "a mere failure to interfere, or to prosecute, so as to prevent the illegal use, cannot be construed to amount to a permission, or into a silent affirmative acquiescence in such use. The jury having retired, after some hours came into court, and being inquired of by the court, respecting the difficulty in arriving at a verdict, stated, that "there was some trouble as to whether the defendant should have assented to the fact charged, to the person occupying the house, or whether it could be done to other persons;" whereupon the court

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instructed them, that "it is not necessary that defendant should have told the lessee that he consented to the same being used for the illegal purpose. Consenting to a thing is the result of our own mind. All that is necessary, is to find that defendant actually consented." Again: "The assent is the result of his own mind, and need not be coupled with any other person; but in order to ascertain the assent, the jury must find that defendant did some affirmative act, or made some declaration in connection therewith, or in relation thereto, from which the jury may find that the defendant did so assent." To these instructions, so given, exception was taken. And now it is urged, that they convey the idea that the assent might rest in the defendant's mind alone, uncommunicated; or that, at least, they were ambiguous, and would tend to mislead the jury. One or two sentences of the instruction tend somewhat to ambiguity, it is true, but the concluding words distinctly hold, that the jury must find that the defendant did some affirmative act, or made some declaration, from which to conclude his assent. It would probably have been better to adhere to the term "permit," used in the statute; but, taking the instructions together, the court is unable to perceive that the jury could understand that a silent assent, in his own mind, wholly uncommunicated, and not acted on, would justify a verdict against the defendant. Upon the whole, therefore, we are of the opinion that the judgment should be affirmed.

Judgment affirmed.

FOTEAUX v. LEPAGE, *et al.*

F. was the administrator of the estate of L., deceased, and also the guardian of his minor children, six in number. Upon a settlement of his accounts before the county court, there was found to be due F., from the said estate, the sum of \$26,40, for which a judgment was rendered in his favor by the county court, and there was found to be in his

6	123
88	495
6	128
110	57
6	123
108	483
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hands, of the estate of his wards, and due to them, a certain sum to each. From the decision of the county court, upon the accounts of F., as administrator and guardian, the heirs appealed to the district court, in which the accounts were referred to a commissioner, to restate the same, and report to said court. The commissioner reported that there was due to F., as administrator, from the estate, \$10,68, and that a certain sum was due to each heir, on the 20th of September, 1855, from said F., making a total of \$1766,51. Both parties excepted to the report of the commissioner, but they were overruled. The district court confirmed the report, ordered interest to be allowed on the amount reported to be due to the heirs from F., from the date of the filing of the report, to the time of its acceptance by the court; and, adding the several amounts together, including the sum due one of the heirs, who had deceased, rendered judgment against F., in favor of "The Heirs of L.," for \$2,079,15: *Held*, 1. That the accounts of F., as administrator, and as guardian, could not be treated as a whole, and that they could not be taken to the district court, nor brought to the supreme court, by one and the same proceeding, in the nature of an appeal; 2. That no judgment could be properly rendered in favor of the heirs, by the name of "The Heirs of L.;" 3. That in such a proceeding, neither the county court, nor the district court, was authorized to render a judgment against F., either as guardian, or as administrator.

Where the same person is administrator of an estate, and also guardian of the minor heirs of the intestate, his account as administrator is distinct from his account as guardian; and his account as guardian of each one of the heirs, is distinct from that of all the others. The county court is required to consider each account separately, and to render a distinct adjudication upon each; and it is from such decision that an appeal must be taken, and not one appeal from the whole.

Each one of the heirs is entitled to have his portion of his ancestor's estate kept to itself, and to require his guardian to render a distinct account in relation to it. If a judgment is to be rendered against the guardian, it should be for such sum, to be ascertained by the court, as each heir may be entitled to, and not a judgment for the whole amount in his hands, due to all the heirs.

A proceeding before the county court, to require an administrator, or guardian, to make a settlement of his account, and to ascertain the situation of the estate of which he is administrator or guardian, is in no sense a proceeding to recover a judgment against the administrator or guardian, for the money received by him, or remaining in his hands. In such case, neither the county court, nor the district court, is authorized to render any judgment against the party. All that it is empowered to do, is to ascertain the state of the accounts, as such administrator or guardian, in order that, when so ascertained, the parties interested may take such further steps as they may deem expedient.

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An administrator has no right to receive the rents and profits of the real estate of his intestate, accruing after his decease.

The account of an administrator or guardian should be rendered under oath.

Where a ward is of an age to earn his own livelihood, and the income of his estate is not sufficient for his nurture and education, the ward must either be bound out as an apprentice to learn a trade, or application must be made to the court of probate, for permission to encroach upon the principal of the estate.

As a general rule, the expenses of the ward must be kept within the income of his estate.

The rents and profits of the real estate, and next the interest of the ward's money, are to be first resorted to, for his nurture and education; and the guardian will not be permitted, without an order of the probate court, to that effect, to encroach upon the principal sum of the ward's estate.

Where, in the settlement of a guardian's account, it appeared that at the time of the appointment, one of the wards was sixteen, and the other fourteen, years of age; that one of them was in the employ of his guardian, rendering him service, and was capable of earning his food and clothing; that each was charged with their board at the rate of sixty dollars per annum, for two years after the time of the appointment of the guardian; that they were not allowed anything for their labor or services to the guardian; that the guardian had not only expended upon the wards, the rents and profits of the real estate, and the interest of their money, but had also expended largely of the principal; that the amount reported by the guardian, as having been expended in the education of the wards, from 1842 to 1858, was \$21.24; and that during a period of ten years, no settlement of the guardian's accounts had been made; and where it was not shown that the guardian was authorized, by any order of the probate court, to encroach upon the principal of the estate, and thereupon the charge against the heirs for board, was rejected: *Held*, That the claim was properly rejected.

Where a commissioner appointed to state an account of a guardian, made yearly rests, and compounded the interest annually: *Held*, That the account was properly stated.

Where it is shown that a guardian has made more than the legal rate of interest, out of the money or property of the ward, he will be charged with all that he has made out of the estate. Where nothing is shown, he will be charged with the highest rate fixed by law.

Where a guardian has been careless and negligent in the discharge of his duty, and in the custody of the estate of the ward, a court will be justified in withholding any compensation.

The amount of indebtedness from the guardian to the ward, should, in no case, be allowed to fall below the principal sum coming to his

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hands ; and no credit claimed, or payments made, by him, should be allowed him in his account, which encroach upon the principal of the ward's estate, unless such encroachment is shown to have been first directed by the court of probate.

The guardian must produce vouchers for all expenditures made by him ; and where this cannot be done, proof of the payment or expenditure, must be given by his own oath, or by other sufficient testimony.

Appeal from the Dubuque District Court.

THURSDAY, JUNE 10.

Upon a settlement of the accounts of Foteaux, as administrator of Clement Lepage, deceased, there was found due him, from the estate, the sum of \$26,40, for which judgment was rendered in his favor by the county court. As guardian of the minor heirs of Lepage, there was found to be in his hands, of the estate of his wards, and due to them, respectively, the following sums—that is to say: To Clement Lepage, \$387,14; to Louis Lepage, \$363,02; to Felicite Lepage, \$424,90; to Joseph Lepage, \$118,06; to William Lepage, \$104,78; to Mary Lepage, \$52,74. Clement Lepage, one of the heirs, had departed this life, in 1849 or 1850, at the age of twenty-three years, intestate, and unmarried. The county court ordered that the sum of \$387,14, the amount of his estate in the hands of his said guardian, be paid into court, to the clerk thereof, to be retained by him, until claimed by his proper representatives or heirs. From the decision of the county court, upon the accounts of Foteaux, as administrator and guardian, the heirs of Lepage appealed to the district court; by which court the accounts were referred to a commissioner, to restate the same, and report to said district court. The commissioner found, and reported, that there was due to Foteaux, as administrator, from the estate, \$10,68; and that the amounts due to the several heirs, on the 20th of September, 1855, from their guardian, were as follows: To Clement Lepage, \$534,22; to Louis Lepage, \$371,75; to Felicite Lepage, \$371,75; to Joseph

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Lepage, \$242,63 ; to William Lepage, \$147,23 ; to Mary Lepage, \$98,93—making a total of \$1766,51. Both parties filed exceptions to the report of the commissioner. The heirs excepted for the reason, that Foteaux was charged by the commissioner, with interest on the money in his hands, at the rate of six *per centum per annum* only. Foteaux excepted to the report, because: 1. He was charged certain sums as administrator and guardian, without authority of law ; 2. Certain credits claimed by him, were not allowed ; 3. The interest was compounded at the end of each year.

The district court confirmed the report of the commissioner ; ordered interest to be allowed on the amount ascertained by him to be due to the heirs of Lepage from Foteaux, from the date of the filing of the report to the time of its acceptance by the court ; and adding the several amounts together, rendered judgment against Foteaux, in favor of "The Heirs of C. Lepage," for *two thousand and seventy-nine dollars and fifteen cents*. This judgment includes the amount found to be in the hands of Foteaux, of the estate of Clement Lepage, one of the heirs, who had departed this life. It does not appear that the district court made any order in reference to the account of Foteaux, as administrator of the elder Lepage ; and no disposition is made of the appeal from the decision of the county court, upon the administration account. The record contains the accounts of Foteaux, as administrator of Lepage, as well as his accounts as guardian of the heirs. Foteaux appeals. The errors complained of, and the other material facts, are stated in the opinion of court.

F. E. Bissell and *J. S. Blatchley*, for the appellant, cited no authorities.

J. S. Covel and *B. W. Poor*, for the appellees.

I. It is a general rule of the common law, that the expenses of the infant, or ward, shall be kept within the

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income or produce of his estate; and a guardian is not to be permitted to encroach upon the principal of his ward's estate, without the special previous permission of the court of probate. *Davis v. Harkness*, 1 Gilm., 178; *Walker v. Wetherell*, 6 Vesey, Jr., 474; *Clark v. Clark*, 8 Paige, 158; 2 Lead. Cases in Eq., 169; *William's Case*, 3 Bland., 186; *Hanson v. Chapman*, Ib., 138; *Long v. Norcorn*, 2 Ired. Eq., 354; *McDowell v. Caldwell*, 2 McCord, 43; *Davis v. Roberts*, 1 Smedes & M., 543; *Myers v. Wade*, 6 Randolph, 444; *Willard v. Chovin*, 2 Strobb. Eq.; *Anderson v. Thompson*, 11 Leigh, 458; *Austin v. Lamar*, 23 Miss., 192; *Freelock v. Turner*, 26 Ib., 394; *Fowler v. Brown*, 5 Texas, 418.

II. Annual rests should be made in the guardian's accounts, and ten per cent. interest per annum charged. Story's Eq., sec. 1277; Stat. of 1843, 432; *Schieffelein v. Steward*, 1 Johns. Ch., 627; *Raphael v. Bohm*, 11 Vesey, Jr., 92; *Rowand v. Kirkpatrick*, 14 Ill., 10; *Moore's Ex. v. Beauchamp*, 5 Dana, 77; *Jennison v. Hapgood*, 10 Pick., 108; *Jones v. Fox*, 13 E. L. & E., 140; *Robertson et al. v. Archer, Adm'r*, 5 Randolph, 324; *Holmes v. Logan*, 3 Strobb. Eq., 31.

STOCKTON. J.—We think the parties have erred in supposing that all these accounts could be considered as a whole, and that they could be taken to the district court, or brought to this court, by one and the same proceeding, in the nature of an appeal. These are all separate and distinct accounts. The accounts of Foteaux, as administrator, is distinct from his accounts as guardian of the heirs. So, his account as guardian of each one of the heirs, is distinct from that of all the others. The county court is required to consider each one separately, and to render a distinct adjudication upon each account. It is from each separate decision, that an appeal must be taken, and not one appeal from the whole. The parties, nor the court, cannot, by denominating the administrator and guardian,

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the plaintiff, and the heirs of Lepage, the defendants, unite the accounts into one proceeding, in such a sense as that one appeal brings up for consideration all the accounts; or that one judgment may be rendered, disposing of the whole, and of the various questions arising in them. As the decision of the court must be a distinct decision upon each account, so there must be a separate appeal from each decision. Each one of the heirs is entitled to have his portion of his ancestor's estate kept to itself, and to require his guardian to render a distinct account in relation to it. If a judgment is to be rendered against the guardian, it should be for such sum, to be ascertained by the court, as each heir may be entitled to, and not a judgment for the whole amount in his hands, due to all the heirs. The action of the district court, in adding together the amounts found to be in the hands of Foteaux, as guardian, and due to the several heirs; and in rendering judgment against him for the whole sum, was therefore erroneous. It was not competent to unite the heirs, as plaintiffs, in any such judgment, and no judgment could properly be rendered in their favor as "The Heirs of C. Lepage."

Nor are we satisfied that this was, in any sense, such a proceeding as that either the county court, or the district court, was authorized to render a judgment against Foteaux, either as guardian or as administrator. It was commenced by the heirs, to require the administrator and guardian to make a settlement of his accounts with the county court, and to ascertain the situation of the estate of which he is administrator, and the amounts in his hands belonging to each of the heirs. It was, in no sense, a proceeding against Foteaux, to recover a judgment against him for the money received by him, or remaining in his hands. It was to compel him to state his accounts, and report to the county court his doings as administrator and guardian. Neither the county court, nor the district court, was authorized to render any judgment against him. The jurisdiction of neither court was invoked for any such purposes.

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All that it was empowered to do, was to ascertain the state of Foteaux's accounts, as administrator and guardian, in order that when so ascertained, the parties interested may take such further steps as they may deem expedient. Such of the heirs as were of age, were entitled to demand, and receive, their estate from their guardian. On his failure to pay, they had their remedy against him by suit upon his bond, to enforce payment. Some of the heirs were not of age, and Foteaux had not been removed from his position as guardian of those under age. We do not see that, under these circumstances, there was any propriety in rendering a judgment against him for the money ascertained to be in his hands. When a new guardian is appointed, the court may order the effects of the minor to be delivered to such new guardian. Code, sec. 1511.

Connected with this blending of the different accounts, and illustrating the absolute necessity of keeping them separate and distinct, we notice that Foteaux has included in his account as administrator, moneys received by him for the rent of the real estate of Lepage, after his death, and with which he should properly be charged as guardian of the heirs. Foteaux had no right, as administrator, to receive the rents accruing after the death of Lepage. So, the several sums paid by him for necessary repairs, improvements and taxes, upon the property, should be charged to the heirs, and included in his account as guardian. *Foltz v. Prouse*, 17 Ill., 487.

Other questions are raised by the exceptions taken to the report of the commissioner, which it may be proper for us to determine before finally disposing of the cause. The exception taken to the report by Foteaux, that he had been improperly charged by the commissioner, in his account as administrator, with the sum of \$75,50, for rent of house in the years 1852 and 1853, has been abandoned by the appellant in the argument. It is shown by the account rendered by the administrator himself, that these rents were received by him. The misapprehension grew out of the fact that the commissioner had included, in one

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item, matters which, in appellant's statement, were set down as several different items.

It is next urged by Foteaux, that certain credits claimed by him in his account as administrator, were not allowed by the commissioner. As the several amounts claimed to have been paid by him, and for which he claimed credit, were for improvements to the real property of the heirs, and for the taxes thereon, it would have been a sufficient reason for rejecting them from the account of the administrator, that they were properly chargeable to the heirs, in his account with them as guardian. They were rejected by the commissioner, except the sum of \$55, on the taxes, out of the amount of \$115, claimed to have been paid. The commissioner should, perhaps, have allowed the further sum of \$5,00, shown to have been paid for erecting a chimney. The other items were properly rejected by him, for the reason that no vouchers were produced for the payments claimed to have been made, and no sufficient evidence offered to show the payments. The account of the administrator was not even rendered under oath. The amount found by the commissioner to the credit of the administrator, will be increased by the amount paid for the chimney, to the sum of \$15,68.

It is objected by Foteaux, that the commissioner rejected certain charges made by him for the tuition, boarding, and clothing of his wards. It is impossible for us to reverse the decision of the district court upon the report of the commissioner, only so far as the evidence may, in our opinion, tend to show that his decision was erroneous, and that the district court erred in overruling the objections taken to it. In respect to the account of Clement Lepage, one of the heirs, the commissioner reports that he had rejected the charge made by the guardian against him for board, &c., for the reason that said Clement was sixteen years of age at the time of the commencement of the account; that he was in the employment of his guardian, rendering him service, and was at least capable of earning his board and clothing; and that if the guardian preferred

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to keep him in his employ, the compensation to which he was entitled, should set off the charge made for boarding and clothing. To these considerations urged by the commissioner, for rejecting the charges, it may be added, that the account of the guardian is not rendered on oath; that no vouchers are produced for any payment made by him; and that none of the items are admitted, with the exception of a small amount paid for tuition, which was allowed by the commissioner.

The objections taken to the report of the commissioner, so far as they relate to the account of the guardian with Clement Lepage, apply equally to the account with each of the other heirs. At the time of the appointment of Foteaux, as guardian, some of the wards were of an age to earn their livelihood: and as to them, the commissioner held that the guardian was not entitled to anything for their board and clothing. We are not satisfied that his decision is wrong, in this respect; and we think the court did not err in confirming his report, so far as to disallow the charges made by the guardian against the the heirs, for board and clothing.

Each one of the heirs was entitled to an equal portion of his father's estate. This consisted of certain real property in Dubuque and Galena. The property in Dubuque was under rent, and the guardian is properly charged with the amount to which each one of the heirs was entitled, of the rents received. The property in Galena was sold upon an order of the court; and the guardian, during the years 1842, 1843 and 1844, received the proceeds of the sale. This money it was his duty to put to interest upon mortgage security, to be approved by the court of probate. The letting to interest is to be always for one year; and at the end of each year, the interest is to be added to, and made part of, the principal. See Act of 1839, 432, sec. 9. In addition to this, it is unquestionably the duty of the guardian, when there are more wards than one, to keep an account with each one, and to keep the estate of each ward to itself.

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The guardian has the power, under the direction of the court of probate, to superintend the education and nurture of the ward; and for that purpose, he may pay out such portion of the ward's money, as the probate court shall, from time to time, order and direct. The rents and profits of the real estate, and next the interest of the ward's money, are to be first resorted to for his nurture and education. Section 10, Act 1839. The guardian will not be permitted, without an order of the probate court to that effect, to encroach upon the principal sum of the ward's estate. The act of 1839 seemed to contemplate that, by direction of the court, such principal may be encroached upon. Certainly, without the order of the court, the guardian will not be allowed to keep the ward in idleness and ignorance, and spend the whole of his little patrimony in payment for his board and clothing. The policy of allowing any portion of the principal to be expended in payment for mere board and clothing, is, in our opinion, more than questionable. For the completion of the education of the ward, or for his future advancement, by enabling him to enter upon a trade or profession, by which his livelihood may be earned, it has in some cases been permitted. But, as a general rule, the expenses of the ward must be kept within the income of his estate. If this is not sufficient for his nurture and education, the ward must either be bound out as an apprentice, to learn a trade, or application must be made to the court of probate for permission to encroach upon the principal of his estate.

At the time of the appointment of Foteaux, as guardian, Clement Lepage was sixteen years of age, and Louis Lepage was fourteen. There is nothing to show that these boys were not, at this time, of sufficient ability to earn their support. They are charged, however, by their guardian, with their board, at the rate of sixty dollars per annum, for two years after this time, and are not allowed anything for their labor or services by him. It is not stated what amount per annum was received by the guardian for the rent of the property of the wards in Du-

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buque, nor what the yearly rent of the same was worth. A portion of it was, perhaps, occupied by the family of Foteaux, with the rent of which he is not charged. According to the account rendered by the guardian, he has not only expended upon the nurture and education of Clement and Louis, the rents of the real estate, and the interest of their money, but he has expended of the principal of Clement's estate, the sum of \$135; and of Louis, \$118. And so, of the other children; until there is left of William's estate, only \$9,85; and he brings Mary, the youngest, in debt \$29,53. During the time of his acting as guardian—from 1842 to 1853—the amount reported by him as having been expended in the education of the wards, is the sum of \$21,24. The remainder of their property seems to have been invested by the guardian in his own business, and squandered for his own gratification.

The district court did not err in confirming the report of the referee, in his statement of the account of Foteaux with the three eldest children of Lepage. In respect to the remaining three, the amount due to each, as ascertained by the commissioner, falls below the principal sum admitted to have been received by Foteaux. The amount to which each one was entitled, from the proceeds of the real estate, was the sum of \$284,67. By the report of the commissioner, this sum has been reduced, by the credits allowed the guardian, until there remains of the estate of Joseph, the sum of \$242,63; of the estate of William, \$147,23, and of the estate of Mary, \$98,93. The guardian has not shown that he was authorized by any order of the probate court, to encroach upon the principal sum in the case of either of these heirs; nor has he shown that the expenditures for which he claims credit were of a nature to justify such an encroachment. No reason is shown why, during the period of ten years, no settlement of his accounts has been made; nor why application has not been made to the court of probate for permission to expend upon the support of the wards more than the interest of their money, and the rents of their real estate.

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Under these circumstances, we think the district court would have been justified in holding the guardian to even a stricter accountability than seems to have been done.

It was certainly right to compound the interest at the end of each year. Under some circumstances, rests of a shorter period than twelve months have been sanctioned. Where a person holding the estate of minors in a fiduciary capacity, shows himself fraudulently reckless or careless of the fund committed to his charge, courts have ordered the interest to be calculated with half-yearly rests. *Raphael v. Bochor*, 11 Vesey, Jr., 92. As to the rate of interest, we think that six per centum is all that should be allowed. Where it is shown that the guardian has made more, he will be charged with all that he has made out of the ward's estate. Where nothing is shown, he will be charged with the highest rate fixed by law. Interest at the rate of ten per centum can, however, only be charged by agreement of parties.

As the cause must be reversed, and be remanded to the district court for further proceedings, upon the exceptions taken to the report of the commissioner, we notice another exception taken to the report by Foteaux. He objects that he is charged with compound interest on the amount received by him, and that whilst he is allowed a commission on the principal amount, by way of compensation for his services, the commissioner refused to allow him a commission on the interest charged to him. It does not follow, necessarily, that the guardian is entitled to a commission on all the money received by him, or on all the money charged to him. The statute provides that the guardian shall receive such compensation as the court may, from time to time, allow. Code, sec. 1515. This compensation is often allowed in the shape of a per centage on the amount of money received or charged to the guardian. The court may, however, well allow him a sum in gross, proportioned to the labor, risk and trouble, devolving upon him, in the care of the person and estate of his ward. Where he shows, however, a degree of carelessness and neg-

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ligence in the discharge of his duty, and in the custody of the estate of the ward, the court will be justified in withholding any compensation. Where, as in the present case, the guardian delays for ten years to make a settlement; and where, instead of putting out the money of his ward at interest, as required by law, he uses the same himself, and objects to being charged for the use of it at a greater rate of interest than six per centum per annum, when the evidence shows that it might have been loaned by him at ten per centum, and that it was even worth more, the court would have been justified in refusing to allow him any compensation.

Our attention has also been called to mistakes in the calculation of interest, by the commissioner, upon the amounts found to be in the hands of the guardian. The district court will correct the calculation of interest in the account with Clement Lepage, one of the heirs. There is an error, also, in the calculation of interest upon the total amount found in the hands of the guardian, from September 20, 1855—the date of filing the report by the commissioner. This error is unimportant, however, in view of the fact, that there is no judgment to be rendered by the district court for the gross amount in the guardian's hands, due to the heirs: the court will ascertain the amount in the hands of the guardian, due to each heir, at the time of entering up the final decree. When the amount is so ascertained, the proper steps may be taken by each, to enforce the payment of the same by the guardian.

The amount of indebtedness from the guardian to the heirs, should, in no case, be allowed to fall below the principal sum coming to his hands; and no credits claimed, or payments made by him, should be allowed him in his account, which encroach upon the principal of the ward's estate, unless such encroachment is shown to have been first directed by the court of probate. The account of the guardian must be required to be made under oath. He must produce vouchers for all expenditures made by him, and where this cannot be done, proof of the payment or

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expenditure, must be given, by his own oath, or by other sufficient testimony. *Davis v. Harkness*, 1 Gilman, 178; *Clark v. Clark*, 8 Paige, 158; *Walker v. Wetherell*, 6 Vesey, 474; *Prince v. Logan*, 1 Spear's Eq., 209; *Teague v. Dendy*, 2 McCord, 207; *Hanson v. Chapman*, 2 Bland., 186; *Long v. Norcorn*, 2 Ired. Eq., 354; *Myers v. Wade*, 6 Randolph, 444; *Villard v. Chovin*, 2 Strobb. Eq.; *Anderson v. Thompson*, 11 Leigh, 458; *Austin v. Lamar*, 23 Miss., 192.

For the reasons given above, the judgment of the district court will be reversed, and the cause remanded for further proceedings, in conformity with this opinion.

SCHAFFNER *et al.* v. GRUTZMACHER *et al.*

A widow cannot settle the estate of her husband, and make distribution and appropriation, as to her seems right; nor can she, with the assets of the estate, purchase real estate, taking the title to herself, and make the property her own; and by so doing, she becomes an executor *de son tort*.

Where personal property is left with a widow, as the head of a family, and exempt from administration, under section 1829 of the Code, she does not become the absolute owner of the property thus appropriated. Although a widow, or an heir, is entitled to a definite portion of an estate, and though this may be well determined, yet neither can put his or her hand into the purse of the deceased, and judge and administer for him or herself.

Still less can a widow take that which belongs to herself and others jointly, and which, at her death, would belong to others entirely, and invest it, and call the proceeds exclusively her own.

Where a wife unites with her husband in a conveyance in fee simple of the real estate of the husband, she is not bound by the covenants in the deed, nor is such deed a bar to any title subsequently acquired by her.

Where a sworn answer in chancery sets up matter not responsive to the bill, the new matter is not to be taken as true.

Where a widow assumes to administer upon the estate of her husband, without legal authority, and has made herself an executor *de son tort*,

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she cannot take credit for that which, under a legal administration would have been her own.

Appeal from the Dubuque District Court.

THURSDAY, JUNE 10.

Bill to declare and enforce a trust. The bill alleges that Andrew Bickel deceased in October, 1854, leaving Eva, his widow, and Mary, Sarah, Matthias, and George, his children, and heirs at law, of whom Mary married Martin Schaffner, one of the complainants, and Sarah married Michael Reilly, another of the complainants; and that Eva, the widow, afterwards married Frederick Grutzmacher, one of the respondents. The complainants are the said Mary, and Martin Schaffner, her husband, Sarah, and Michael Reilly, her husband, and Matthias Bickel, a minor; and they make defendants, the said Eva, with Frederick Grutzmacher, her husband, and George Bickel, a minor, who, they allege, refuses to be a co-plaintiff with them, through some collusion with the other respondents.

The bill alleges that Andrew Bickel, at his decease, was possessed of certain tracts or parcels of land in the county of Dubuque, consisting of an eighty acre tract and two forty acre tracts; that the legal title to the eighty acre parcel was in the said Martin Schaffner, to secure the payment of two hundred and fifty dollars, which said Andrew owed said Martin; and that the legal title to the two forty acre parcels was in said Michael Reilly, to secure the payment of one hundred and fifty dollars, due from Andrew to him. The bill farther alleges, that the said Andrew, at his death, was possessed of a large amount of personal property, consisting of teams, cattle, horses, grain, hay, &c., to the value of six hundred dollars; that he was then in the occupation of the land before mentioned, which is of the value of six thousand dollars; that after the death of said Andrew, the said Eva remained in the possession of the aforesaid land, and continued to reside thereon as she had before done; that soon after the death of her said

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husband, she sold and disposed of a large part of the personal property belonging to the estate, and out of the proceeds paid the said Martin about \$250, the amount due him; that he, with his wife, the said Mary, on the 9th of November, 1854, conveyed to her the said eighty acre tract of land, intending thereby to convey the same to her for the use and benefit of the estate of said Andrew; that from the proceeds of the sale of the personal property, she also paid the said Michael about one hundred and fifty dollars, the amount due him; and that he, with his wife, the said Sarah, conveyed the said two forty acre tracts of land to the said Eva, on the 6th of November, 1854, intending thereby to convey the same for the use and benefit of the estate of said Andrew; that about the 12th of October, 1855, the said Eva intermarried with the said Frederick, and she now holds out that she has the said lands in her own right, and refuses to recognize the said Mary, Sarah and Matthias, as the heirs to said property, or to allow that they have any right therein, and she pretends that she has right to sell the same, and threatens so to do.

The complainants then aver that, the said Mary, Sarah and Matthias, with said George, have the ownership, and are entitled to the possession of the said lands, in the proportion of one-fourth each, as heirs at law of said Andrew, subject to the right of dower in the said Eva. They represent that a large portion of the land is principally valuable as timber land, and that the defendants are cutting the timber, and committing waste, and pray that they may be enjoined therein. They therefore pray that the said Eva may be decreed to hold said real estate in trust for the use and benefit of those interested in the estate of said Andrew; that the said Mary, Sarah, and Matthias may be decreed and declared to be the heirs of, and to, three-fourths of the said estate of said Andrew, in equal parts, subject to the right of dower in said Eva; and that she, with Frederick, her husband, may be ordered and decreed to make and execute to complainants a good and

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sufficient deed of the said three-fourths, subject to the dower right aforesaid, and for such other relief, &c. The deeds of the said Michael and Martin to the said Eva, are set forth, from which it appears that that from said Michael is expressed to be for the consideration of one hundred and fifty dollars, "in hand paid by Eva Bickel," and is a full warranty deed for the two forty acre tracts. The form of the deed is, that "we, Michael Reilly, and Sarah, his wife, do convey," &c.; and at the conclusion, "the said Sarah Reilly hereby relinquishes her right of dower to the premises herein before conveyed." By the other deed, "Martin Schaffner and Mary, his wife," convey the eighty acre tract, for the consideration of two hundred and fifty dollars, in hand paid by Eva Bickel, with full covenants of warranty, and at the conclusion, "the said Mary Schaffner hereby relinquishes her right of dower," &c.

The defendants answer, denying all right in the complainants, as asserted in their bill, and the respondent Eva, claims the said property as in her own right, in fee simple. The defendants, Eva and Frederick, file an amended answer, also, in which they admit the death of said Andrew, as alleged; that she, Eva, was his widow, and that he left children and heirs at law, as stated in the bill. They admit that Andrew was in possession of said real estate, but aver that he was not seized of the legal title, but that this was vested in the said Michael and Martin, and so remained for a long time thereafter, and until it was conveyed to her, as afterwards stated. They admit that Andrew left some considerable amount of personal property, nearly all of which was household furniture, farming tools and teams, which was by law exempt from distribution, in all amounting to some five hundred and ninety dollars. They say they have no knowledge of said Andrew being indebted to said Martin and Michael, and of the latter holding the title of the real property as security therefor; but they admit that there may have been some agreement and understanding, that if said Andrew should pay them respectively some certain sum of money, he

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should have the lands; and deny any other agreement or understanding in relation thereto.

The respondents further answer, that on the death of Andrew, said Eva was left without any means of support, save what she could obtain by her own labor, with the assistance of her said sons, from the said lands, in the possession of which she remained; that she was applied to, and pressed by said Martin and Michael, to pay to them the several sums of money which they demanded for the aforesaid parcels of land, and offered and agreed, that if she would pay said moneys, they would convey the lands to her free from incumbrances, as her property; that in consequence of these urgent solicitations, in the hope of obtaining the means of support for herself, in order to raise the money required to make the said payments, and being unable to obtain it otherwise than by the sale of the personal property left in her possession, as the widow of her late husband, she made sale of one yoke of oxen, two cows, three heifers, a quantity of hay and straw, two plows, one harrow, some wood, the household furniture, potatoes, corn, oats, and other smaller articles, for the sum of four hundred and thirty-six dollars; besides which she sold one horse, several swine, a cooking stove, and rented the homestead for six months, all for sums amounting to one hundred and sixty-three dollars; by all which she realized the total amount of five hundred and ninety-nine dollars; that out of this she paid for physician's bill, funeral charges, &c., the sum of fifty-one dollars, leaving her five hundred and forty-eight dollars, the whole avails of the personal property of the deceased, all, or nearly all of which, was exempt from distribution, and was hers as owner, and for her support; that from the above sum, she paid said Martin two hundred and fifty dollars, and said Michael one hundred and fifty dollars, in consideration of which they respectively conveyed the said parcels of land to her and her heirs, with full knowledge of all the facts, and with the full intention and design that the same should thereby be and become the

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property of said Eva, free from all claim by or in behalf of the heirs of said Andrew; and that by reason of such appropriation of the above funds, she was left in great embarrassment, and has been obliged to struggle for her subsistence by her own labor, &c. And she again claims the lands as her own in fee, as being purchased by the avails of property which belonged to her in part in fee, as her portion of the personal estate of said Andrew, and the remainder of which belonged to her as his widow, for her support, and that of the family. The defendants deny the commission of waste, but admit the cutting of some timber for proper and necessary purposes.

The complainants filed a replication, setting forth further details of the indebtedness of said Andrew to said Martin and Michael; showing that the lands were held by them substantially and equitably in mortgage; averring that, for the purpose of saving the cost of administration, it was proposed that said Eva should pay off the said debts, and take the title for the benefit of the heirs; denying that she was obliged to struggle for a subsistence; and alleging that she lived for several months in the family of said Schaffner, and was at liberty to continue. They deny that the personal property was exempt from distribution. They aver that she paid Schaffner \$180, and not \$250; and paid Reilly about \$50, and not \$150; and deny that it was their intent, by their deeds, to cut off the claims of the heirs, and vest the property absolutely in her, but aver the contrary.

The court found that the said Eva held the said real estate as a trustee, for the use and benefit of the heirs of the said Andrew Bickel, and decreed that she make and execute to the said Mary, Sarah, Matthias, and George, a good and sufficient deed, conveying the same, subject to the right of dower of the said Eva. From this decree, the defendants appeal.

W. T. Barker, and Blatchley & Harvey, for the appellants, made the following points:

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I. This cause having been heard upon the pleadings, without other evidence, the sworn answer of the defendants must be taken as true. The replication will only be regarded as a common similiter.

II. The grantors of defendant, Eva, can recover no interest in the land in dispute, based upon title acquired prior to the execution of the deeds to her, until they present a case entitling them to have the deeds reformed or rescinded, on the ground of fraud or mistake, which they have neither shown nor prayed for in the bill.

III. Admitting that Bickel died seized of the lands in question, then Mrs. Schaffner and Mrs. Reilly, as his heirs, held their interest therein as separate estate from their husbands, and, under our statutes, were authorized to convey them in the same manner as unmarried women, or other persons.

IV. The defendant, Eva, at least, succeeded to the rights of a mortgagee of the lands, by the payments to, and the conveyance from, Schaffner and Reilly, and cannot be rightfully divested of her mortgage lien, even if plaintiffs' view of the case be sustained.

In support of the above propositions, they cited the following authorities: 2 Kent Com., 167; *Jackson v. Vanderheyden*, 17 Johns., 167; *Hill's Lessee v. West*, 8 Ohio, 226; *Massie v. Sebastian*, 4 Bibb, 436; Rawle on Cov., 429, and note; Code, sec. 1201; 2 Kent, chap. 28; 1 Bouv. Inst., 114; 6 Wend., 12; Code, chap. 84.

Clark & Bissell, for the appellees. [No brief of the attorneys for the appellees came to the hands of the Reporter.]

WOODWARD, J.—The leading points in this case have been settled by that of *Claussen v. Le Franz*, 1 Iowa, 228, which was very much like the present one in its main and essential features. The widow of Burmeister appropriated certain funds of the estate, consisting principally or entire-

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ly of money belonging to the deceased, to the completion of certain contracts for the purchase of real property, which were outstanding at the death of her husband, and took the title in her own name. Afterwards she married LeFranz, and claimed the property as her own, as she was entitled by law to a portion of the estate, which portion, she urged, was applied to these payments. It was determined that she held the title thus acquired in trust for the heirs at law, to be treated and disposed of as the law directs.

The widow of a deceased cannot thus settle the estate of her husband—make distribution and appropriation as to her seems right—and take titles to herself, and make the property her own. She becomes an executor *de son tort*. It is true, that she is entitled to a share in personal property, with the children, and this becomes her own absolutely. And a certain description of property is not to be accounted assets for the payment of debts, but remains for the benefit of herself and the family, until disposed of according to law. It has not been decided what rights exist under this provision, nor does the present case call for a close examination of this question, but it seems clear that she does not become the absolute owner of the property thus appropriated. So much was recognized as the law, in the cases of *Wilmington, Adm'r v. Sutton*, *post*, and in *Wilmington, Adm'r, v. Goff*, at the present term of this court.

But it is immaterial what may be the rights of the widow in this respect, and a discussion of them is not of place, because whatever they may be, she is not the proper judge. She cannot assume to decide them, and administer the estate. This must be done in the manner, and by the tribunal, directed by the law. The law requires all this property to be inventoried, that the court, representing the law, and all interested, may know what there is, and what is due to each, and make the proper distribution, and hold the proper persons accountable. Any other

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mode of proceeding would leave the minor and the absent to the mercy of others. Although a widow, or an heir, is entitled to a definite portion, and though this may be well determined, yet neither can put his hand into the purse of the deceased, and judge and administer for himself. Still less, may she take that which belongs to herself and others jointly, and which, at her death, would belong to others entirely, and invest it, and call the proceeds exclusively her own.

The only circumstance in this case, which may possibly cause it to differ in principle from that of *Claussen v. La-Franz*, *supra*, or which seems to present any difficulty, is that the two heirs, Mary and Sarah, the wives of the grantors, join in the deeds of their husbands. Apprehensions have been entertained by members of the legal profession, that trouble might arise from the too frequent practice of joining the wife with the husband in the body of a deed, when the conveyance is of his land, and she intends only to release the right of dower, instead of causing her to appear only in that part technically termed the "*in testimonium*." The latter is certainly the safer, and therefore the better practice, especially as it much more truly expresses the real intent. The former mode—her joining in the body—has led to serious questions: such as whether she is bound by the covenants, and whether she is barred of a subsequently acquired title. Courts have held that she is not bound by the covenants, and perhaps, also, that she is not barred of an after acquired title. But how do they come at such conclusion? The form of the deed is such as, in the case of other persons, carries all the grantor's right, and bars the future. They must either look upon the release of dower in the conclusion of the deed, as sufficient evidence of the intent, or else they look beyond the deed, to inquire whether the land conveyed belonged to the husband or the wife, and in the former case, treat it as only a release of dower. In strictness, neither of these courses is consistent with the rules of law, but

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courts have been led to their adoption by the hardness of the case.

Under the practice alluded to, it is not an idle question. How do we know whether a conveyance signed by a *feme covert*, with her husband, is her deed or his; that is, whether he or she is the principal grantor in it, and whether she is to be held bound. The answer to this must be found in one of the methods above referred to. This question, and the answer to it, have a bearing upon the deeds of conveyance in the present case. Here we are aided, however, more than is the case sometimes. There is the relinquishment of dower, which is wholly superfluous, if the wife is making a conveyance of a substantial interest. But, besides this, the deeds are presented accompanied by much explanatory matter, which shows that it was the husband's interest and title which was purchased, and that the consideration was the original one existing between him and the deceased, and no new one moving the wife. So that, if courts have heretofore been correct in the manner of arriving at the conclusion, that a given deed was that of the husband, and that the wife intended only to release her possibility of dower, much more are we justified in declaring, in the present instance, that the deeds were those of the husbands, and that the wives relinquished the dower right only.

But if this manner of viewing the subject is not entirely correct, there is another which, in our opinion, must settle it for this case. Admitting that the deeds are the deeds of the wives, as well as of the husbands, such relations and facts are disclosed respecting them, as take away their binding force in equity: *First*. There is the leading thought, before expressed, that the widow cannot thus assume to settle the estate, and invest its means in realty for her sole use. Her very act of purchasing with those means, though she purchases from the heir himself, situated as these were, was a purchase to their use and benefit. Their ancestor, from whom they inherit, had as yet but an equity, the legal title being in their husbands, and this equitable title was to be changed into the legal. Had they

not released their dower, by executing the deeds, they would, in law at least, have held a third by dower, and then a fourth of the remainder by inheritance, and thus injustice would have been done to the other heirs.

Another consideration worthy of thought, is the absurdity of the transaction, if they are held to have conveyed their whole interest. The consideration paid was the original one between the husbands and the deceased, and now the money of the wife is paid to the husband to obtain a title for a third person ; or, if you please, their own money is paid them, to obtain their title—they are bought out by their own funds. They loose their personal property or money, as an independent means, separate from their husbands, and they loose their lands also. The nature of the transaction is such, as to override the considerations drawn from the form of a deed. There is something nearly approaching to fraud, and tainting the deeds ; or, at least, the transaction convinces a court of equity, that it was the intention of all to place the legal title in the widow, in trust for those concerned. It was impossible, therefore, in our opinion, for the widow to gain a title to herself, by paying their own means to the heirs or their husbands, and this supercedes any consideration arising from the deeds ; and, *secondly*, the intent is made manifest through the whole transaction, that the deeds were made to place in the representatives of Andrew Bickel, that title for which he had contracted.

Some points remain to be spoken of. The respondents claim the benefit of an answer sworn to, and uncontroverted by testimony. In what has been said, the answer, in effect, receives this force. There is no necessity for making any question in relation to this, for the opinion proceeds upon the facts there stated : one of which is, that the widow purchases with funds raised from the property of the estate, upon which the cause hinges. But we cannot give the answer the effect of conclusive evidence, in relation to the intent of the grantors in making the deeds. This averment of the answer is new matter of the defendants, and not responsive to the petition, and there

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may be, besides, an objection arising from the nature of the case. We look to the facts and circumstances, and believe these are sufficient to warrant the conclusion drawn from them.

In connection with this subject of the force of the answer as evidence, we may remark further, that it is immaterial whether the husbands held the title as security for debts owing to them from Andrew Bickel, as complainants allege, or whether he purchased the lands of them, and held their bonds, and they were not to convey until payment was made. It amounts to the same thing, in substance, whether the widow paid off an incumbrance, or paid the purchase money. It was the completion of the contract of her husband, and of the ancestor of these heirs.

It is not correct to suppose, as the respondents urge, that the complainants are asking that their conveyance be set aside and cancelled. To do this, would destroy their own case, or at least would throw inequality and injustice into the cause, and disturb the equity of their case. They need that their deeds be supported—for this is requisite—in order to place the title in such position that all may obtain their proper interest under them. The respondent's counsel have labored to show, that the wives were capable of making the deeds; that the deed of a married woman is valid; and that no farther certificate of acknowledgment is requisite than in other cases. We do not perceive that any difficulty arises in the case, in this respect, and therefore give no time to its consideration.

One thing farther remains. The respondent, Eva, claims that, "admitting that all the property sold belonged to the estate, still a portion of the money paid, was from her own earnings, and another portion from rent of the homestead; and that if she did not become owner of the lands in proportion as she furnished the purchase money, she at least succeeded to the rights of a mortgagee, to the extent of her own money used to remove the incumbrances, and has a right to demand judgment, before she is divested of all title to the lands." We should be inclined to regard this

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claim, if the respondent showed, in her answer, any money in fact contributed from own earnings. But she shows that she realized from the assets of the estate, all that she paid to acquire the title to the land. Her statement exhibits the following: She realized the sum of \$599, all of which was from the personal property of the deceased, except \$42, for the rent of the homestead. Deducting this, she had \$557, from which she paid expenses of last sickness and of the funeral, amounting to \$51. Allowing this to her, it leaves \$506. She paid for the title—to the one, \$250, and to the other, \$150, being \$400 in all, which being taken from the \$506, leaves her \$106, over and above the payments to secure the title. In all this, there is no money claimed, as of her earnings, nor is there anything which can be counted as her own, save the rent of the homestead, even admitting that this was her's.

But her position is, that one share of the personalty of the deceased was her own, by the provisions of the law, and that she is entitled to a credit for this. One answer to this claim might be, that after the payments made for the title, and the expenses for last sickness and funeral, there still remained in her hands, a sum more than equal to her share of one-fifth, making the estimate on the sum total produced by the sale of the personalty. Another position is, that she should be credited for that portion of the property which would have remained in her possession as the head of the family, for the use of herself and the family. It has before been intimated, that it is not correct to assume this to be her property, absolutely,

But the answer to both these claims, more pertinent in such a case as the present, is, that when she has assumed to administer the estate, without the law, and has made herself an executor *de son tort*, she cannot take credit for that which, under a regular administration, would have been her own. A portion would have been hers, individually; but either she has it, in the surplus of funds above what she has paid for the title, or she has so mingled it with that which belongs to the heirs, in the purchase or

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release of the title, that she can have no lien for it upon the real estate, but must rest upon her interest or rights in the realty.

Therefore, the judgment of the district court is affirmed.

ANSON v. STEIN *et al.*

Where a party claims as heir, he must first establish affirmatively, his relationship with the deceased; and secondly, negatively, that no other descendant exist to impede the descent to him.

Where in an action of right, the plaintiff, for the purpose of proving title in D. S., as heir of A. S., offered in evidence an exemplification of the records of the surrogate's court of the county and State of New York, which contained a renunciation of their right to administer upon the estate of A. S., deceased, signed by D. S., the father, and E. S., and others, the brothers of the said A. S., and a petition for letters of administration on said estate by one J. C. S., and the granting thereof by the said surrogate court; and where the defendant objected to the admission of said exemplification, as evidence of the death of said A. S., and of the heirship of his estate by the said D. S., which objection was overruled by the court, and the evidence admitted: *Held*, That the court erred in admitting the evidence.

Appeal from the Muscatine District Court.

THURSDAY, JUNE 10.

This was an action to recover the possession of certain real estate, in the city of Muscatine. The property was purchased of the United States by Niles Higginbotham, who, in the month of August, 1839, conveyed the same to Alexis Smith; in September, 1852, Daniel Smith, representing himself in the deed to be the father and sole heir of Alexis Smith, then deceased, conveyed the premises to Suel Foster, who in August, 1854, conveyed the same to the plaintiff. To establish the fact of the death of Alexis Smith, and that Daniel Smith was his father, and sole heir, the plaintiff offered in evidence an exemplification of there-

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cord of the surrogate's court of the county of New York in the State of New York, including a renunciation of their right to administer upon the estate of Alexis Smith, deceased, signed by Daniel Smith, the father, and Edwin Smith and others, the brothers of said Alexis Smith, and the petition for letters of administration on said estate, by Jesse C. Smith, and the granting thereof by the said surrogate's court. To the introduction of the said paper, as evidence of the death of said Alexis Smith, and of the heirship of his estate by the said Daniel Smith, the defendants objected; their objections were, however, overruled by the court, who, in connection therewith, charged the jury, "that the said exemplification was *prima facie* evidence of the facts purporting to be shown by it, and is sufficient, unless evidence is given to the jury to contradict it."

The defendants, to show title in themselves, offered in evidence a tax deed from the treasurer of Muscatine county, made by virtue of a sale of the premises, under a judgment rendered in 1849, for the taxes on the same, unpaid and delinquent for 1847. The deed was objected to by plaintiff, and excluded by the court. The defendant appeals.

Richman & Brother, for the appellant.

Henry O'Connor, for the appellee.

STOCKTON, J.—The grant of letters of administration is, in general, *prima facie* evidence of the intestate's death; for only on evidence of that fact, ought they to have been granted. 1 Greenl. Ev., sec. 550; 2 Ib., sec. 355. So, where the grant of administration turns on the question of which of the parties was next of kin, the sentence, or decree, of the surrogate's court on that question, is conclusive every where, in a suit between the parties for distribution. But no collateral fact, to be collected merely by inference from the decree or grant of administration, and which was not the point directly tried, is proved the exemplification of

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the record. Greenl. Ev., sec. 559. Where a party claims as heir, he must first establish, affirmatively, his relationship with the deceased; and secondly, negatively, that no other descendant exists to impede the descent to the plaintiff.

By the record given in evidence, it is not shown that there was any question for adjudication before the surrogate, whether Daniel Smith was the next of kin heir of Alexis Smith. Certain persons, representing themselves to be the father and brother of the deceased, file with the surrogate a paper, relinquishing their right to administer upon his estate; another person representing himself to be a creditor, files a paper representing to the surrogate, that Alexis Smith died in the city of New York, on the 15th of July, 1849, intestate, without widow or children: and that Daniel Smith, his father, surviving him, and his only next of kin, has renounced his right to administer upon his estate, and asking that he, the said creditor, may be appointed administrator. The surrogate, thereupon, granted letters of administration to the applicant. There was no contest as to the right to administer; there was no dispute as to the facts. The grant of letters of administration to Jesse C. Smith, was not a decision that Daniel Smith was the father of Alexis Smith, and his sole heir. That was not the point directly tried, and if to be collected at all, it can only be collected by inference from the proceedings in the surrogate's court. We are, therefore, of the opinion, that the district court erred in admitting the transcript from the surrogate's court, to prove the relationship and heirship of plaintiff to Alexis Smith, and in the instruction given to the jury, that the same was sufficient for that purpose.

The question as to the validity of a deed for taxes, made by the treasurer under a judgment of the district court, rendered in June, 1849, for the unpaid and delinquent taxes of 1847, has been decided by this court, in the recent cause, of *Williams v. Gleason* 5 Iowa, 284, and *Bleidorn v. Abel et al.*, ante, 5. The ruling made in these cases, we have as yet seen no reason to change.

For the error in the ruling of the court upon the suffi-

ciency of the evidence afforded by the surrogate's transcript, to show the relationship and heirship of the plaintiff to Alexis Smith, the judgment will be reversed. We give no opinion as to the correctness of the ruling of the district court, upon the tax deed of the collector of Muscatine.

Judgment reversed.

PAGE v. COLE.

In an action to recover the possession of real property, brought by the person holding the legal title, an equitable title is no defence against the legal one.

A vendor of real estate, when the purchase money remains unpaid, is not compelled to pursue the course indicated in sections 2068, 2094, and 2095 of the Code. Those sections do not take away his other rights; they only provide for certain matters, in case he resorts to that remedy.

Where a vendee takes possession of real estate, with the consent of the vendor, and fails to pay the purchase money in accordance with the terms of the contract, the vendor can sustain an action against the vendee, to recover the possession, without returning so much of the consideration as may have been paid, or tendering to the vendee, his notes for the purchase money.

Where in an action of right to recover the possession of certain real estate, the defendant answered, admitting that on the first day of May, 1856, the plaintiff was the owner in fee simple of the said premises, and averring that on that date he entered into a written agreement with defendant, to convey the premises to him for the consideration of \$2,000, to be paid as follows: \$500 by the conveyance by defendant to plaintiff of a certain tract of land in Johnson county, consisting of eighty acres, which was then conveyed; and the balance in one, two, and three years from date, for which three promissory notes, of \$500 each, were executed to plaintiff, all which notes are not yet due; and that defendant took possession of the premises, with the consent of the plaintiff—to which answer was appended a copy of the contract, from which it appears that the notes were to draw ten per cent. interest, payable semi-annually, and that upon payment in full of said notes, the deed was to be executed and delivered; and where the plaintiff replied, admitting that defendant went into possession with the consent of plaintiff, and averring that the written obligation contained the entire contract; that the defendant had not paid either of the said notes, one of which became due on the first of May, 1857, (after which date this action was commenced), nor the semi-annual interest which had be-

come due on all the notes—and that the above sums having become due, and being unpaid, on the 29th of November, 1856, the plaintiff gave the defendant written notice to quit the premises on the first day of March, 1857, which he refused to do—to all which replication, except the first count, the defendant demurred, for the following reasons: 1. That said replication showed that the plaintiff had received the consideration for the property, and still retains the same; 2. That the replication does not show that plaintiff has tendered to defendant the promissory notes, and the amount paid upon the contract; 3. That that part of the replication which avers notice to quit the possession, is in the nature of an amendment to the petition, and the addition of a new cause of action; and, 4. That said replication shows no substantial cause of defence—which demurrer was sustained by the court: *Held*, That the court erred in sustaining the demurrer.

Appeal from the Johnson District Court.

THURSDAY, JUNE 10.

An action for the recovery of real estate. The plaintiff claims of the defendant the possession of certain lots in Iowa City, alleging that he has the lawful title to the lots, as the owner thereof, in fee simple, and that the defendant is in possession, and unjustly withholds the same.

The defendant, answering, admits that on the first day of May, 1856, the plaintiff was the owner in fee simple; avers that on that date, he entered into a written agreement with defendant to convey the lot to him, for the consideration of two thousand dollars, to be paid as follows: five hundred dollars, by the conveyance by defendant to plaintiff, of a certain tract of land in Johnson county, consisting of eighty acres, which was then conveyed; and the balance, in one, two, and three years from that date, for which three promissory notes were executed to plaintiff, of five hundred dollars each, which notes are not all due; and that defendant took possession of the lots with the consent of the plaintiff. A copy of the obligation is annexed to the answer, and shows that the notes draw ten per cent. interest, payable semi-annually; and that “upon payment in full of said notes, the said conveyance was to be executed and delivered.”

The plaintiff replies: *First*: Admitting that, defendant went into possession with the consent of plaintiff, but averring that the written obligation contains the entire terms of the agreement. *Second*: He avers that the defendant has not paid either of the said notes, (one of which became due on the first of May, 1857, after which date this action was commenced), nor the semi-annual interest which had fallen due on all of them. *Third*: That the above sum having become due, and being unpaid, on the twenty-ninth of November, 1856, he gave defendant written notice to quit the premises on the first of March, 1857, which he unjustly refused to do, and still holds the same.

The defendant demurs to all of the replication "after the first count," for the reasons, *first*: That it shows that the plaintiff has received the consideration for the property mentioned, and still retains the same; *second*: That the replication does not show that plaintiff has tendered to defendant the promissory note aforesaid, and the amounts paid on the contract; *third*: That that part of the replication which avers notice to quit the premises, is in the nature of an amendment to the petition, and the addition of a new cause of action; and, *fourth*: "Said part of the answer first above named, shows no substantial cause of defence." The district court sustained the demurrer as to the first and second causes, and overruled it as to the third. The plaintiff appeals, and assigns this decision as error.

Clark & Brother, for the appellant.

I. Page still holds the legal title. Cole claims interest under Page, and cannot deny Page's title; 7 Wend., 401; besides, Cole in his answer says, that Page was the owner in fee simple on the first of May, 1856. Was Page's title ever divested or unimpaired? The writing held by Cole is only an *agreement to sell* upon conditions subsequently to be performed by Cole. Nothing in the agreement could be held to amount to a grant; there is no language whatever used, which was even held to carry a legal interest in land.

The fee remained pure in Page, after the agreement; and Cole acquired a bare equity, upon which, alone, he could not recover the property against an intruder, without the aid of the holders of the legal estate; but admitting, for the sake of this argument, that Cole acquired, by the agreement, some kind of a title, it was inferior to the legal title still held by Page, subservient to it, and not adverse to Page. 5 Cowen, 74, and 92.

II. If Page holds the legal title, that is the *fee*, he must prevail against the mere equitable title held by Cole, for the equitable title cannot be set up in bar of the legal title. Adams on Eject., 32, and note 1; and 2 Johns., 221.

III. What title or right can Cole offer in bar of this action? He has no adverse title. Does the agreement with Page give him any definite right to the possession? The writing is silent as to the possession. He acquired no right to the possession by operation of law, under the contract, because it was merely executory, and the possession followed the legal estate. He *must* then be a tenant; the terms of that tenancy are indefinite, and, unless the contrary appeared, he is deemed by the law a *tenant at will*. Code, sec. 1208. Now, Cole does not pretend, in his answer, that there was any defined tenancy; any agreement that he should remain in possession until the maturity of the contract of purchase. He came into possession with the assent of Page, and remained in, under the agreement to purchase. If that be true, the law of Iowa calls him a *tenant at will*, and the current of decisions throughout the country support this view. 9 Johns., 330; 4 Dana, 337; 10 Yerger., 513; Adams on Ejectment, 107, and notes.

IV. The authorities concur entirely in the principle, that the vendor of real estate can recover the possession of his vendee, where the vendee is in under an agreement to purchase, at any time before the conveyance is made; they differ only on the question of a previous notice to quit. *Doe d. Burnfield v. Brown*, 7 Blackford, 142, is di-

recently in point; see, also, 1 Hayw., 381; 5 Blackf., 570; Adams Ejectment, marg., 107, note 1.

Wm. E. Miller, for the appellee.

It is true that the legal title draws with it the possession, but where the plaintiff, who holds the legal title by his written, or even oral, contract, parts with the possession, in an agreement of sale to the defendant, he is estopped from recovering it back, at least until final default, and then he must surrender the defendant's notes, and the part of the consideration paid, except so much as would be equal to the rents and profits.

Whether this was a contract *to sell*, or a *sale*, as between the immediate parties, makes no difference, when Cole was to have the possession, by the contract. This court, in the case of *Pierson v. David et al*, 1 Iowa, 23, says that the "design of sections 2094, 2095, and 2068 of the Code, was to place the vendor and the vendee of real estate in the same position, so far as relates to the remedy, as the mortgagor and mortgagee of express mortgages." Is not Page a vendor, and Cole a vendee? I think this will not be questioned. Then Cole is entitled to the possession until foreclosure; (See Code, sec. 1210); and the plaintiff should pursue his proper remedy, the one provided him by the law. The evident intention of the legislature was to provide a safe and easy remedy in all cases, like the one at bar, and at the same time, cut off such actions as this one, and not permit a party to sell real estate to another—receive part of the purchase money in hand—notes, with interest for the balance, retain the legal title as security, give possession of the land, and afterward turn round, before final default, and dispossess the vendee. I think it cannot be done, and that this court will refer the plaintiff to his proper remedy, and affirm the judgment of the court below.

WOODWARD, J.—The prominent question here made,

notwithstanding the special matter brought to view, is in reality whether an equitable title, or defence, can be set up against the legal title.

This has been so frequently decided, and has become so settled doctrine, that it needs no argument. The long established rule is, that an equitable title is no defence against the legal one, in an action at law; *Smith v. Allen*, 1 Blackf., 22; *Jackson v. Pierce*, 2 Johns., 221; *Jackson v. Chase*, Ib., 84; *Jackson v. Langhead* Ib., 75; *Jackson v. Deyo*, 3 Ib., 422; *Jackson v. Van Slyck*, 8 Ib., 487; *Adams on Ejectment*, 31, (note).

The defendant makes no question as to his right to notice to quit. The plaintiff has given notice, and there is no controversy on this point.

The defendant's argument is brief, and not very clear in its object. The purport of it seems to be, to show that plaintiff cannot maintain an action at law, but must go into chancery. It is, that by virtue of the Code, sections 2094, 2095, and 2068, the parties are, in effect, mortgagor and mortgagee; and that plaintiff must proceed to foreclose as in case of mortgage; and that by section 1210, the defendant is entitled to possession until foreclosure. But these sections have not been understood to compel the vendor to pursue the course there indicated, in all conditions and circumstances of the case. They do not take away his other rights, and are probably but an expression of the common law; or, at most, they only provide for certain matters, in case he resorts to that remedy.

The only ground remaining, which it seems probable that the defendant could intend to take, is one indicated by the pleading, rather than the argument, and that is, that the plaintiff cannot maintain ejectment, until he returns the promissory notes, and the consideration paid; in other words, until he rescinds the contract. But this ground is not tenable. Admitting the parties to hold the relation of mortgagor and mortgagee, the latter may maintain ejectment against the former, at least after forfeiture. *Adams on Ejectment*, 60. And farther: to say that the plaintiff

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may not maintain his action at law, to recover the possession, until he has tendered back the notes, and the money received, is to say that an equitable title may be set up against the legal one, the contrary of which is well established, as is above remarked; but it is true that such recovery settles nothing but the present right of possession, and leaves the vendor with his right in equity, under the contract of sale, to which he may resort, notwithstanding such recovery; and the plaintiff, in his argument, claims no more than this.

Of this character, was the case of *Longworth v. Taylor*, 1 McLean, 392. Taylor, the vendor, had recovered possession in ejectment, and the vendee afterward filed his bill to be permitted to perform the contract, or to enforce performance by the vendor, and it was decreed. The cases first cited in this opinion, are of the same kind with the present. They are *Smith v. Allen*, 1 Blackf., 22, and *Jackson v. Pierce*, 2 Johns, 226, in which there was an agreement, in writing, to sell. *Jackson v. Chase*, 2 Johns. 84, was a case of mortgagee against a mortgagor. *Jackson v. Langhead*, 2 Johns. 75; *Jackson v. Deyo*, 3 Johns., 422. In this case, the consideration was all received, and it was an absolute covenant to convey. *Jackson v. Van Slyck*, 8 Johns., 487. In this, the defendant offered to show that the plaintiff, in purchasing, had acted as his agent.

On whichever of these grounds the court concurred with the defendant, we think there was error. The third ground of demurrer was properly overruled; and the fourth was passed over, probably, as containing some mistake, which rendered it ambiguous or else inapplicable.

Judgment reversed, and cause remanded.

McMANUS v. HUMES.

In an appeal from a justice of the peace, the appellee, on the third day of the term, moved for an affirmance of the judgment before the justice, under the sixty-ninth rule of practice in the first judicial district,

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which rule provides: "That on filing the papers of an appeal in civil suits, by a justice of the peace, with the clerk of the court, it shall be the duty of the clerk to indorse the time of filing, and docket the same, although the appellant may fail to pay the docket fee required by law; and should not said fee be paid or secured by noon of the second day of the term, the appellee, upon motion, shall have the judgment below affirmed, with costs," which motion was sustained, and the judgment affirmed. On the fifth day of the term, the appellant filed a motion to set aside the order of affirmance, and set down the cause for trial, which motion was supported by an affidavit, alleging that before the term of the court, the appellant was taken sick, and confined to his bed until after the commencement of the term; that he was unable to attend to the payment or securing of said fees; that if he had been able to attend to the business, they would have been paid before the commencement of the term; and that he had a meritorious defence to the suit; which motion was overruled. At the time of the affirmance of the judgment, the attorney of the appellant was in court, and made no objection: *Held*, That there was no error in the decision of the court.

Appeal from the Lee District Court.

THURSDAY, JUNE 10.

This action was instituted before a justice of the peace, for the recovery of rent. Judgment was rendered against the defendant, and he appealed to the district court. The sixty-ninth of the rules of practice in the first judicial district is, that "on filing the papers of an appeal in civil suits, by a justice of the peace, with the clerk of the court, it shall be the duty of the clerk to indorse the time of the filing and docket the same, although the appellant may fail to pay the docket fee required by law; and should not said fee be paid, or secured, by noon of the second day of the term, the appellee, upon motion, shall have judgment below affirmed, with costs." The appellant having failed to pay, or secure, the docket fee as required by this rule, the appellee moved for an affirmance on the third day of the term, which was granted. On the fifth day of the term, the defendant filed his motion to set aside the order of affirmance, and to set down the cause for trial on the merits. With this motion he filed his affidavit, stating that before

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the term of the court he was taken sick, and was so confined to his bed, until after the commencement of the term; that he was, therefore, unable to attend to the payment or securing of said fees; that if he had been able to attend to the business, they would have been paid before the commencement of the term; and that he had a meritorious defence to the suit. This motion was overruled, and the defendant appeals, and assigns this ruling as error.

E. C. Moss, for the appellant.

WOODWARD, J.—We do not think the court erred in this decision. The affidavit is unsatisfactory. The defendant does not show that he was deprived of his mental faculties, so that he could not cause the business to be attended to by another person, and it appears that he had an attorney in attendance. And further, the judge has added to the bill of exceptions a statement, that the defendant's attorney was present when the judgment, or affirmance, was rendered, and made no objection thereto. The party's affidavit does not make it appear that he could not communicate with his attorney, and enable him to pay the necessary fee, or direct him to apply for an extension of time, to enable the party himself to be present. The showing is insufficient, and the judgment is affirmed.

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It is the province of the court and its officers to impanel a jury; and when a party is asked whether he has any objection to the jury, the question refers to the persons constituting it, and whether he has challenges to make; and not to the right constitution of the jury in point of numbers.

The law tenders the party a jury for the trial of his cause; and he is not to be charged, as with a fault, if the proper officer has not performed his duty by calling a full jury into the box.

Where a cause is tried before, and a verdict rendered by, a panel con-

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sisting only of eleven jurors, the defect is fatal, unless it has been waived.

Appeal from the Dubuque District Court.

THURSDAY, JUNE 10.

Action on a promissory note. Defence, payment. Verdict and judgment for the defendant. The plaintiff moved that the verdict be set aside, and for a new trial, upon several grounds, one of which was, that there were but eleven jurors upon the panel of the jury which tried the cause. The bill of exceptions certifies that each of the parties was asked by the court, whether they had any objection to the jury, but that the attention of the plaintiff was not called to the deficiency in the number of the jurors; and that it is admitted that neither party knew of the fact.

J. S. Covel, for the appellant, cited the following authorities: *Jones v. Fennimore*, 1 G. Greene, 134; *Ross v. Neal*, 7 Monr., 407; *Dix v. Richards*, 2 How. (Miss.), 771; *Jackson v. The State*, 6 Blackf., 461; *Tillman v. Ailles*, 5 S. & M., 378; *Wolfe v. Martin*, 1 How. (Miss.), 30; *Ayres v. Barr*, 5 J. J. Marr., 287; *Oldham v. Hill*, 5 Ib., 300; *Spencer v. Kinnard*, 12 Texas, 186.

W. T. Barker, for the appellee, relied upon the following: *Berry v. Kennedy*, 5 B. Monr., 226; 6 Exchequer, 450, note.

WOODWARD, J.—We should regard it as the province of the court and its officers, to impanel a full jury; and that when a party is asked if he has any objection to the jury, it refers to the persons constituting it, and whether he has challenges to make; and we should not be inclined to hold him responsible for the right constitution of the jury, in point of numbers. The law tenders him a jury for the trial of his cause, and he is not to be charged as with a fault, if the proper officer has not performed his duty in

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this respect. If there were anything indicating a previous knowledge, and consequently a waiver implied from his not objecting, the case might be different, but it is agreed that neither party knew of the defect, and therefore, there was no waiver.

This is regarded as a fatal defect in criminal cases, without hesitation. Such was *Jackson v. The State*, 6 Blackf., 461. And it is not easy to state a reason why the rule should be different in civil causes, when there is no waiver, either express or implied. There are several cases in which the objection prevailed; *Ross v. Neal*, 7 Monr., 407, is one. In this case there were thirteen jurors, and the supreme court said it would have been fatal, if the party had taken exception in the court below, as by moving for a new trial; but that he could not first take it in that court, but said that if there had been a *deficit*, it might have vitiated the verdict, as no verdict. In *Dixon v. Richards*, 2 How., (Miss.), 771, the court says, "a jury must consist of twelve. No other number is known to the law. Here there were but eleven. The judgment must be reversed." In *Wolfe v. Martin*, 1 How., (Miss.), 39, there were thirteen jurors, and a motion for a new trial was overruled. The supreme court reversed the judgment. In *Tillmon v. Ailles*, 5 S. & M., 368, it was held not to be fatal that there were thirteen jurors, but the court said, a verdict by a less number than twelve in issues of this kind would be void, but a verdict by a greater number than twelve is not so on that account." *Ayres v. Barr*, 5 J. J. Mar., 287. In this case, there were eleven jurors. In *Oldham v. Hill*, 5 J. J. Mar., 800, there were less than twelve. It was on a writ of inquiry. See, also *Graham & Wat.*, on New Trials, 169, 70, and 210, note; *Duncomb's Trials*, *per pais*, 92, 3; *Foote v. Lawrence*, 1 Stew. 483; *Tums v. Commonwealth*, 6 Met., 224; *Kennedy v. Williams*, 2 Nott. & McC., 79. There is no doubt but that such defect may be waived, but before this can be inferred, it must appear, at least, that the party had knowl-

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edge of its existence. Without this, a waiver cannot be inferred.

The judgment will be reversed.

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6	164
82	641

Where an action is brought upon a written contract, the objection that no consideration is shown upon the face of the instrument, or that none is averred by the plaintiff in his petition, cannot be raised by a demurrer.

The want of consideration, or the failure, in whole or in part, of the consideration of any written contract, must be averred and shown by way of defence.

In an action on an agreement in the nature of a penal bond, the plaintiff cannot recover the penalty named in the agreement, nor any sum more than nominal, until some damage is averred and shown.

Where in an action by A. L. and J. R., on a written contract, which reads as follows: "I, E. W. L., do this day, December 20th, 1855, agree and bind myself, in the sum of five hundred dollars, to have the east half of the south half of south-east quarter of section thirty-three, township eighty, range six, released of a certain mortgage executed by me to M. J., I having this day sold forty acres of said land to A. L. and J. R. Said release to be made in sixty days from this date," and which was signed by E. W. L. and E. C. The petition alleged that on the 18th day of December, 1855, the said E. W. L., in consideration of the sum of four hundred dollars, sold and conveyed to A. L. thirty acres, part of the premises described in the contract, by deed, with covenants of general warranty, and against incumbrances, and on the 19th of the same month, in consideration of two hundred and forty dollars, sold and conveyed to J. R. ten acres of the same premises, by deed, with like covenants; that the said lands were not, at the time of the said conveyances, free from incumbrance, but were subject to a mortgage executed by E. W. L. to one M. J., for the sum of eighteen hundred dollars; that after the execution and delivery of said deeds, the plaintiffs, upon being informed thereof, applied to E. W. L. to have the lands conveyed to them, released from the lien of said mortgage; that the said E. W. L. agreed so to do, and on the same day, in consideration of the premises, executed the instrument of writing sued on; that the said defendant did not release said lands from said mortgage, nor any part thereof; that the same remains unreleased and unsatisfied; that defendants have wholly neglected and refused to release said lands from said mortgage; and that, therefore, plaintiff's

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ask judgment for the penalty of said written agreement; and where the petition was demurred to, for the following reasons: 1. That there are no proper parties to the said agreement; 2. That the petition shows that the pretended agreement, is without any consideration; 3. That the plaintiffs seek to recover for their several demands, in a joint action; and, 4. That it is not averred or shown that plaintiffs have sustained any damage, by reason of the failure of defendants to comply with their agreement—which demurrer was sustained by the court: *Held*, 1. That the names of the obligees were implied, if not expressed; 2. That the agreement was joint as to the obligees, and the action properly brought in their joint names; 3. That the question as to the consideration, could not be raised by demurrer; 4. That the plaintiffs could, at least, recover nominal damages; and, 5. That the court erred in sustaining the demurrer.

Appeal from the Johnson District Court.

FRIDAY, JUNE 11.

The plaintiffs bring their suit upon the following instrument of writing, executed by defendants: "I, E. W. Lake, do this day, December 20th, 1855, agree and bind myself, in the sum of five hundred dollars, to have the east half of the south half of the south-east quarter of section thirty-three, township eighty, range six, released of a certain mortgage executed by me to Matthew Johnson, I having this day sold forty acres of said land to Anton Linder, and Jacob Rees. Said release to be made in sixty days from this date.

E. W. LAKE.

EZEKIEL CLARK."

The plaintiffs aver, that on the 18th day of December, 1855, the said E. W. Lake, one of defendants, in consideration of the sum of four hundred dollars, sold and conveyed to Anton Linder, one of the plaintiffs, thirty acres, part of the above described premises, by deed of conveyance, with covenants of general warranty, and against incumbrances; and on the 19th of the same month, in consideration of the sum of two hundred and forty dollars, sold and conveyed to Jacob Rees, one of the plaintiffs, ten acres, part of the same premises, by deed of conveyance, with like covenants; that the said lands were not, at the

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time of the several conveyances aforesaid, free from incumbrance, but were subject to a mortgage executed by defendant Lake, upon the same, to one Matthew Johnson, for the sum of eighteen hundred and fifty dollars; that after the execution and delivery of said deeds, they, the plaintiffs, upon being informed thereof, applied to defendant, Lake, to have the lands conveyed to them, released from the lien of said mortgage; and that the said Lake agreed so to do, and on the same day, together with Ezekiel Clark, the other defendant, in consideration of the premises, executed the instrument of writing sued on. The only breach alleged is, that defendants did not release said lands from said mortgage, nor any part thereof; that the same remains unreleased and unsatisfied; and that defendants have wholly neglected and refused to release said lands from said mortgage. Wherefore, plaintiffs ask judgment for the penalty of said written agreement, to-wit: the sum of five hundred dollars, which amount they claim they are entitled to recover.

The defendants demurred to the petition, for the following reasons: 1. That there are no proper parties to said pretended agreement; and it does not appear that the same is an agreement between the defendants, on the one part, as obligors, and the plaintiffs on the other part, as obligees; 2. That the petition shows that said pretended written agreement, is without any consideration; 3. That the plaintiffs seek to recover for their several demands in a joint action; and, 4. It is not averred or shown that plaintiffs have sustained any damage, by reason of the failure of defendants to comply with their agreement. This demurrer was sustained by the court, and the plaintiffs appeal.

J. D. Templin & Co., for the appellants.

Wm. E. Miller, for the appellees.

STOCKTON, J.—The only question for our consideration

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is, whether there was error in the ruling of the district court in sustaining the demurrer.

I. The instrument of writing is certainly very clumsily drawn, but we think, there is little chance for mistake as to its meaning. By a slight transposition of the sentence, it may be thrown into proper shape, and all room for misapprehension obviated. If the names of the obligees are not expressed, they are evidently implied, by the whole tenor of the agreement; and no one, we apprehend, would be liable to be misled into designating any other than the present plaintiffs as the obligees in the agreement.

II. To the objection raised by the defendant on the demurrer, that the agreement is without consideration and void, it may be replied, that by the statute (Code, section 975), all contracts in writing, signed by the party to the bond, his agent or attorney, import a consideration, in the same manner as sealed instruments did at the time of the adoption of the Code; and by the act of January 25, 1839, it was provided that any instrument under seal, was to be deemed valid and binding, according to the fair intent and meaning thereof, in all cases not otherwise declared by express statute, and unless the execution thereof shall have been obtained by fraud, or for an unlawful purpose. Rev. Stat. 1843, 104. At common law, a contract under seal was valid, without reference to the limitation, the seal implying, of itself, a consideration. When not under seal, the law did not, as a general rule, imply a consideration from the fact that the agreement was in writing; and except in the case of mercantile negotiable paper, it was as necessary to prove a consideration, as if the contract were oral only. 1 Parsons on Contracts, 355 and 496; *Dodge v. Burdell*, 13 Conn., 170; *Cutler v. Everett*, 33 Maine, 201.

The agreement in this case being in writing, a sufficient consideration is to be presumed, in the same manner, as it would have been presumed at common law, in an action on an instrument under seal. The objection that no consideration is shown upon the face of the instrument,

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or that none is averred by the plaintiffs in their petition, cannot be taken upon demurrer. The want of consideration, or the failure, in whole or in part, of the consideration of any written contract, must be averred and shown by way of defence. Code, sec. 976. The defendant, Lake, was already bound to the plaintiffs by the covenants of his deeds of conveyance to them, to discharge all incumbrances upon the land. His liability to plaintiffs upon these covenants, ought to be considered a sufficient consideration for his present undertaking. His co-defendant, Clark, must be considered in the light of a surety for the faithful performance of his agreement.

III. The question whether the contract, as to the obligees, is joint or several, or both joint and several, is one of no little difficulty. This difficulty arises, not less from the unusual nature of the agreement, than from the still more unusual form in which it is expressed. As the obligees in the contract, are not expressly named, but may be inferred from the circumstances—the situation and relation of the parties, we think it may also be inferred, that the agreement, was joint as to the obligees. We should, at least, feel great difficulty in deciding, that it was not such an agreement as might be sued on in the names of the plaintiffs jointly. The damages to be recovered, (if any damages can be recovered), upon it, may be a gross sum, to be divided between those entitled to it. There is nothing inconsistent in the plaintiffs taking an obligation to themselves jointly, to secure their several demands. In such cases the interest of the obligees is joint. A joint obligation and right, may co-exist with a several obligation, or right; for there may arise from the same contract, one joint duty to all, and also several joint duties to each of the parties. 1 Parsons on Contracts, 20. The action is not brought to recover damages for a breach of the covenants of warranty in the deeds of conveyance from Lake to the plaintiffs, but for the breach of the defendants written agreement, to have the lands conveyed to plaintiffs released from the lien of the mortgage. The cove-

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nant appears to us to be single in its nature, though intended to secure several interests; and, we think, was properly sued on in the names of the plaintiffs jointly. Whether the plaintiffs may not have sued on the same severally, it is not now necessary to determine.

IV. Under the fourth cause assigned for demurrer, the defendants claim that it is not averred or shown by the petition, that plaintiffs have sustained any damage by the non-performance of their agreement by defendants. In actions on penal bonds, the plaintiff must set forth the breaches, and the judgment rendered thereon must be for the actual damages only. Code, section 1888. It is not alleged in this case, what damages, if any, the plaintiffs have sustained by reason of the non-performance of defendants. It is not shown that they have been required to pay any sum or sums of money, to release the lands from the lien of the mortgage, nor that they have been in any manner evicted of the premises. The plaintiffs cannot recover the penalty mentioned in the agreement, nor, indeed, any sum more than nominal, until some damage is averred and shown. *Funk v. Creswell*, 5 Iowa, 62.

The judgment of the district court, sustaining the demurrer, will be reversed, and the cause remanded, with leave to plaintiffs to amend their petition.

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98 169

Where it appeared that the plaintiff, as the agent of C., sold to the defendants a threshing machine, who gave to the plaintiff their note for the balance due; that plaintiff had for sale two classes of machines, one selling for \$195 and the other for \$815, which prices were shown by bills posted up in plaintiff's store, and to which defendants were referred at the time they inquired for the price; that they undertook to pay \$195 for a machine, and a bill of sale was executed, which, in its terms, described a machine of the higher value; that defendants received one of the higher class, and within a short time were advised

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of the mistake, and plaintiff offered to take back the machine; and that one of the defendants (the other not being present), stated that their engagements to thresh were such, that they could not return it, but that he would see his brother, (the other defendant), and make it right: *Held*, That the action was properly brought in the name of the plaintiff, and that he could recover.

Appeal from the Henry District Court.

SATURDAY, JUNE 12.

This action was brought to recover for a threshing machine sold to defendants. It was tried by the court, and the facts found and set out in the record. Judgment for plaintiff, and defendants appeal. The facts of the case are stated in the opinion of the court.

F. Semple, for the appellants.

R. L. B. Clarke, for the appellee.

WRIGHT, C. J.—From the facts found, as required under section 1793 of the Code, the case may be stated briefly thus: The plaintiff, as the agent of one C., sold the machine to defendants, but their promise to pay was to plaintiff; a note for what was supposed to be the balance due, being made payable to him. In the sale, there was a mistake; plaintiff had for sale two classes of machines; one selling for \$195, and the other for \$315, which prices were shown by bills posted in plaintiff's store, and to which defendants were referred at the time they inquired for the price. They undertook to pay \$195, for a machine, and a bill of sale was executed, which, in its terms, described a machine of the higher value. They received one of the higher class; and within a short time, were advised of the mistake, and plaintiff proposed to take back the machine. One of the defendants, (the other not being present), stated that their engagements to thresh were such, that they could not return it, but that he would see his brother, (the other defendant), and make it right.

Harmon v. Lee.

It is objected that plaintiff's remedy is in equity, as he seeks to change or reform a written contract. We do not think so. He seeks to recover the value of a machine sold to defendants, and does not ask that a contract shall be reformed and specifically enforced. In substance, he says: "I sold defendants an article worth \$315, and this they knew was the selling price. They paid me for one, the selling price of which was \$195, and this is what it was understood they were to have. They, by mistake, got the more valuable article—refuse to pay the excess, after in effect promising to do so—and for this I bring this action." That he may do this, without resorting to equity, we entertain no doubt. It is urged also, that the action should have been brought in the name of C., and not F. his agent. The contract was made in the name of the plaintiff, and the promise made to him. He is, therefore, the party having the *legal* interest, and the proper plaintiff. *Farwell v. Tyler*, 5 Iowa, 535.

Judgment affirmed.

HARMON v. LEE.

6	171
114	128

Where a defendant is not found, and service is made under section 1721 of the Code, the return on the original notice must state the time and manner of service—at whose house the copy of the notice was left, and the name of the person with whom it was left—or a sufficient reason must be given for omitting to do so.

Where the requirements of the statute as to service, are not observed, the defendant is not in court, and any judgment against him is erroneous.

Where an original notice was returned as follows: "Served as to J. S., by leaving a copy with E. K., a person over fourteen years of age," and judgment by default, for want of an appearance, was rendered against J. S., for the sum claimed; *Held*, That the service was insufficient to give the court jurisdiction, or to authorize judgment against the defendant.

Dupont v. Downing.

Appeal from the Story District Court.

SATURDAY, JUNE 12.

The notice in this case was returned, "served as to Jonathan See, by leaving a copy with E. Kelly, a person over fourteen years of age." There was no appearance by defendant, and judgment by default was rendered against him for the amount claimed. The defendant appeals.

J. T. Frazier, for the appellant.

No appearance for the appellee.

STOCKTON, J.—There was no service in this case as required by the Code, (section 1721), sufficient to give the court jurisdiction, or to authorize judgment against defendant. If not found, the defendant may be served by leaving a copy of the notice at his usual place of residence, with some member of his family, more than fourteen years of age. The return must state the time and manner of service—at whose house it was left—and the name of the person with whom it was left—or a sufficient reason must be given for omitting so to do. Where these requirements of the statute, as to the service, are not observed, the defendant is not in court, and any judgment against him is erroneous, and must be reversed. *Pilkey v. Gleason*, 1 Iowa, 85.

Judgment reversed.

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A justice of the peace possesses no power to set aside the verdict of a jury in a criminal case.

Nor has a justice of the peace any authority to try the prisoner himself, after the defendant has demanded a trial by jury, and render a judgment against him for a fine and costs.

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In an action against a justice of the peace for wrongfully issuing an execution, a copy of the execution issued by him, with a copy of the constable's return indorsed thereon, certified by the defendant to be a true copy, may be offered in evidence by the plaintiff, without producing the original execution, or accounting for its absence.

In an action against a justice of the peace for wrongfully issuing an execution, when one of the issues to be determined is, whether the defendant issued the execution without lawful authority, the docket of the defendant as a justice of the peace may be offered in evidence by the plaintiff, for the purpose of showing, negatively, that no judgment had been rendered against the plaintiff, by the defendant, as justice of the peace.

A judgment in favor of the State of Iowa, will not authorize an execution in favor of an individual.

A plaintiff, by merely charging the defendant with having wrongfully issued an execution, cannot cast upon him the burden of producing the judgment to support it. The plaintiff must first make out a *prima facie* case against the defendant, before he can call upon the latter to disprove the charge against him.

Where in an action against a justice of the peace for wrongfully issuing an execution, his docket is offered in evidence by the plaintiff, and that fails to show a judgment which would authorize the issuing of the execution against the plaintiff, the burden of proof is changed, and the defendant is required to produce the judgment, if any had been rendered.

Where in an action against a justice of the peace, for wrongfully issuing an execution, the answer alleged that the execution was issued under the following state of facts: That the defendant was an acting justice of the peace for Johnson county; that the plaintiff was charged before him, on the information of one T. B., with an assault and battery, and being arrested and brought before defendant for trial, such further proceedings were had, that a judgment was rendered against him, in the name of the State of Iowa, for five dollars and costs of suit; that in issuing execution on said judgment, the defendant, by mistake, inserted the name of said T. B., as plaintiff, instead of the State of Iowa; that the plaintiff at the time, well knew the fact of said mistake, and fraudulently concealed the same, and procured his said property to be levied upon by the constable, and sold on said execution; that the proceeds of the sale have been applied in satisfaction of the judgment aforesaid; and that this, and none other, is the grievance complained of; to which answer was appended a transcript from the docket of defendant, as justice of the peace, showing all the proceedings had before him on the trial of the information against plaintiff, for the assault and battery on T. B., from which transcript it appeared that the plaintiff pleaded not guilty, and demanded a jury; that the jury heard the evidence, and returned a verdict of not guilty; that the defendant, as justice, set the verdict aside; that he then rendered

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judgment against plaintiff for a fine of five dollars and costs; and this is the judgment on which the execution complained of, issued; and where the answer was demurred to, and the demurrer sustained by the court: *Held*, That the demurrer was properly sustained.

Appeal from the Johnson District Court.

SATURDAY, JUNE 12.

This suit is brought to recover damages for the injury sustained by the plaintiff, from the alleged wrongful act of defendant as justice of the peace, in issuing an execution against the plaintiff, in favor of Thomas Bryan, for the sum of five dollars, and costs, taxed at \$27.95, whereby property of the value of \$100, was taken by the constable, and sold to satisfy said execution; whereas, in fact, as alleged by plaintiff, no judgment against him had at any time been recovered before said defendant at the suit of said Bryan, and defendant had no legal right, power or authority to issue such execution.

The answer of defendant, to which a demurrer was filed, avers that the execution was issued under the following state of facts: That defendant was an acting justice of the peace for Johnson county, and that the plaintiff was charged before him, on the information of one Thomas Bryan, with an assault and battery upon said Bryan, and being arrested and brought before defendant for trial, such further proceedings were had, that a judgment was rendered against him in the name of the State of Iowa, as plaintiff, for five dollars, and costs of suit; that in issuing execution on said judgment, defendant, by mistake, inserted the name of said Bryan as plaintiff, instead of the State of Iowa; that the plaintiff, at the time, well knew the fact of said mistake, and fraudulently concealed the same, and procured his said property to be levied on by the constable, and sold on said execution; that the proceeds of the sale have been applied in satisfaction and payment of the fine and

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judgment aforesaid; and that this and none other is the grievance complained of by the plaintiff. Attached to this answer, and made part of the same, is a transcript from the docket of defendant, as justice of the peace, showing all the proceedings had before him on the trial of the information against plaintiff, for the assault and battery upon Bryan. By this transcript, it is shown that when brought before defendant, he pleaded "not guilty," and demanded a jury to try the issue; that the jury being sworn and impannelled, and having heard the evidence, returned a verdict of "not guilty;" that defendant as justice set aside the verdict, and rendered a judgment against the prisoner, (the present plaintiff), for a fine of five dollars, and the costs of suit; and that this is the judgment on which the execution complained of was issued. Judgment was rendered for the plaintiff, and the defendant appeals. The other material facts, and the errors assigned, will sufficiently appear, from the opinion of the court.

J. D. Templin & Co., for the appellant.

Clarke & Henley, for the appellee.

STOCKTON, J.—I. A demurrer to this part of the answer, was properly sustained. To give no other reason, the judgment rendered by the justice, and the execution issued by him, were void. He had no power to set aside the verdict of the jury. Code, section 2304. He had no authority to try the prisoner, after he had demanded a trial by jury. Ib. sections 3332. He had no right to render a judgment against him for the fine and costs, until he had been found guilty by a jury, in the mode prescribed by law.

II. It is, in the second place, assigned for error by defendant, that the court permitted the plaintiff to give in evidence, a copy of the execution issued by defendant against the plaintiff, with the copy of the constable's return

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thereon, without first requiring the original execution to be produced, or its absence accounted for. A judicial record may be proved by the production of the original, or by a copy thereof, certified by the person having the legal custody thereof, authenticated by his seal of office, if he has one. Code, section 2437; 1 Starkie's Evidence, 211. In this instance, the copy of the execution offered in evidence, was certified by the defendant, as justice of the peace, to be a true copy of the original. The defendant was the person having the legal custody of the execution, and his certificate endorsed on the copy, authorized the plaintiff to give it in evidence. The return of the constable, indorsed on the execution, a copy of which was also given in evidence to the jury, was as follows: "Served, July 14, 1856, by levying on one gray mare, supposed to be three years old: the same advertized the 21st of July, and sold on the 4th of August, 1856, for the sum of \$70.00. Returned, satisfied in full, August 20th, 1856.

JAMES COTTERELL, *Const.*"

This return of the constable, was made by him on the execution, and the execution itself returned to the defendant, the justice who issued it, before he went out of office. The copy offered in evidence, is certified by the justice to be a true copy of the original execution. The certificate does not expressly refer to the constable's return, but is fairly to be understood as embracing it, as part of the execution, the copy of which, with the return, was given in evidence. The objection understood to be made by the defendant is, not that the return of the constable offered in evidence, was not a true copy of the original, but that being a copy, it was not the best evidence, and that the plaintiff should have been required to produce the original, or account for its absence. Of his right to give a certified copy in evidence, we have no doubt. Whether it was sufficiently shown to be a true copy of the original, has been the only question with us concerning it. What it sufficiently proved, when given in evidence, does not seem to have been made a subject of inquiry.

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III. The defendant, in the third place, objects that the court erred in permitting the plaintiff to introduce the docket of the defendant, as justice of the peace, and to read therefrom in evidence to the jury, the entries made by him of the proceedings had before him in the case of the *State of Iowa* against *Henry F. Dupont*, the plaintiff. It is objected that the evidence furnished by the justice's docket, did not tend to prove the issue joined between the parties, and was consequently irrelevant. One of the issues to be determined was, whether defendant issued the execution, without lawful authority. The evidence furnished by the docket did not perhaps show affirmatively that such execution had been illegally issued; but it was proper to be given in evidence, for the purpose of showing negatively, as claimed by plaintiff, that no judgment had been rendered by defendant as justice of the peace against the plaintiff, at the suit of Thomas Bryan. A judgment in favor of the State of Iowa, did not authorize an execution in favor of Bryan. If the docket furnished any evidence of a valid judgment, to authorize the execution, it was for the advantage of defendant that it should be introduced; if it did not, it was quite as much a part of the plaintiff's case, to introduce it, to show that there was no such judgment.

IV. We come next to the instructions given and refused by the court. At the request of the plaintiff, the jury were charged, that, "when a justice of the peace is charged with unlawfully issuing an execution, the burden of proof is on the justice to produce the judgment to support the execution." The defendant asked the court to instruct the jury, that "the plaintiff must show there was no judgment to authorize the execution, or they must find for the defendant, and that the judgment produced on the trial, does not prove that there was no such judgment, as set forth in the petition." The instruction asked by defendant, the court refused to give.

In one point of view, there may be said to have been

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error in the giving of the instruction asked by plaintiff, and in refusing that asked by defendant. The plaintiff, by merely charging defendant with having unlawfully issued the execution, cannot cast upon him the burden of producing the judgment to support it. Having alleged that defendant issued the execution without lawful authority, he must first make out, at least, a *prima facie* case against him. He cannot first call upon defendant to disprove the charge made against him. Viewing it in this light, the instruction given was erroneous. It must, however, be taken in connexion with the fact appearing by the record, that the docket of the defendant as justice of the peace, had been given in evidence to the jury. This docket it was in the power of plaintiff to notify the defendant to produce, that the fact might be determined from it, whether any judgment had been rendered to authorize the execution. It was only when produced and given in evidence, that the burden of proof was changed to defendant, and he was required to show the judgment, if any had been rendered. This was all the evidence necessary to exculpate the defendant from all liability. If his docket failed to show it, the conclusion was a necessary one, that the execution issued without authority, as alleged by plaintiff.

So the instruction asked by defendant, and refused by the court, may in a certain sense have been correct; but after the introduction of the docket, and of the judgment against plaintiff in the name of the State, although these facts alone did not prove that there was no judgment to authorize the execution, yet, when introduced, the burden of proof was changed to defendant, and if there was any such judgment, or if he claimed there was any such judgment, it was his duty to produce it.

The court was further asked to charge the jury, that "if they believed that the execution was issued on the judgment given in evidence, they must find for the defendant." This instruction was properly refused. The judgment against the plaintiff was in the name of the

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State: the execution was in the name of Thomas Bryan. The jury could not well have believed that the execution issued on the judgment. If they were likely to be induced to believe so, it was the duty of the court to inform them that the judgment did not authorize the issuing of any such execution upon it, and if it was issued upon it, it was so issued without authority.

Judgment affirmed.

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In a proceeding to foreclose the equity of redemption in lands sold for taxes, against the property itself, the land should be designated and described, not only in the notice contemplated in sections 506, 1715 and 2083 of the Code, but also in the publication provided for by sections 507 and 1725.

Where the proceeding to foreclose is against the land itself, under section 507 of the Code, and it is against certain named lots of land, and others, not describing them, the court will not acquire jurisdiction as to the parcels of land not described, nor will the property be bound by the decree rendered in such proceeding.

Where it is sought to divest the title to real estate, on account of the non-payment of taxes, a strict compliance with the law is essential.

If the court rendering a decree, has no jurisdiction of the person of the defendant, he will not be bound, and this, whether the court is one of limited or general jurisdiction. And so, if the proceeding is against property, it cannot be condemned, and will not be bound, unless it is properly and legally brought before the court.

In a proceeding against real estate, to foreclose the equity of redemption, under a tax sale, in order to bind the property, it should be proceeded against by description, and the notice should specify and make known, that the plaintiff was seeking to foreclose the equity of redemption of the owner in and to said property, describing it, so that the owner may have an opportunity of knowing that his title is about to be divested.

Under section 508 of the Code, a decree of foreclosure, under a tax deed, is conclusive in the same degree as in other actions.

In a proceeding to foreclose the equity of redemption under a tax deed, the defendant may show that the taxes were paid prior to the sale.

Section 509 of the Code, applies to those cases where payment of the taxes before sale, is shown prior to the rendition of the decree.

After the rendition of a decree of foreclosure under a tax deed, where

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the court is shown to have jurisdiction, the owner is concluded from showing, in a subsequent proceeding, the payment of the taxes prior to the sale.

As the non-payment of the taxes is the essential fact upon which the power to sell rests, the decree of foreclosure necessarily includes within it, the finding of that fact, and must be conclusive.

After the Code went into operation, and prior to the taking effect of chapter 74 of the acts of 1858, there was no power to sell lands for the delinquent taxes of any year prior to 1851.

Whether under a sale of lands for delinquent taxes, made under chapter 74 of the acts of 1858, the purchaser can proceed to foreclose the equity of redemption of the owner, by action in the manner provided by the Code, *quære?*

Appeal from the Des Moines District Court.

MONDAY, JUNE 14.

This was an action to recover lot six in out-lot nine hundred and sixty one, in Barrett's sub-division of lots in the city of Burlington. The defendant answers, setting up his title as required by the petition of plaintiff, which is as follows: Barrett purchased of the United States, on the 8th of November, 1844; he conveyed to one Blankenship, who, on the 11th of April, 1856, conveyed to defendant. Plaintiff replies, setting up certain proceedings under a tax sale, and a decree thereon, vesting the title in said lot in one Barlow, who conveyed to one Greene, February 17, 1856, who, on the same day conveyed to Clark and Tuley—who, on the 8th of May, 1857, conveyed to plaintiff. To this replication there was a rejoinder, setting up various grounds upon which the tax sale and decree relied upon by plaintiff, were irregular and void, and insisting that plaintiff acquired no title thereby. Demurrer to rejoinder sustained, and defendant neglecting to plead over, but abiding by his rejoinder in manner and form as pleaded, judgment was rendered for plaintiff, from which defendant appeals. The matters alleged in the replication and rejoinder are sufficiently stated in the opinion of the court.

J. C. Hall and *C. H. Phelps*, for the appellant.

C. Ben Darwin, for the appellee.

WRIGHT, C. J.*—Did the court below err, in sustaining the demurrer to plaintiff's rejoinder? To determine this question, we have to ascertain, whether the facts set up in said rejoinder, so far as well pleaded, are sufficient to defeat plaintiff's title.

Barlow purchased the lot in controversy, under a sale for the delinquent taxes for the year 1850. The decree was rendered in his favor, on the 13th of November, 1855, but in what year the treasurer sold the property, does not appear. The caption of the decree, which is made a part of the plaintiff's replication, is as follows: "J. W. Barlow v. Lots 1, 11, 12, 15, and 17, in block 962, and other lots in the city of Burlington, and the unknown owners of the same." The decree then proceeds to state certain things as found, and to adjudge that the equity of redemption of the former owner or owners in and to said property, (reciting some thirty lots, including the one in controversy), be forever barred and foreclosed, and that plaintiff be vested with an absolute and unconditional title thereto.

The rejoinder denies that said decree is a bar to the title of defendant, or that Barlow thereunder acquired any interest or claim to said lot, for the following, among other reasons: *First*. That said suit was brought in the name of J. W. Barlow, against lots 1, 11, 12, 15 and 17, in block 962, and other lots in the city of Burlington, and the unknown owners of the same, as defendants, and not against this defendant, or the said Barrett or Blankenship, nor either of them, nor any other person by name, nor by any

*STOCKTON, J., having been of counsel, took no part in the decision of this cause.

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proper or sufficient designation in law, or otherwise; nor had they any notice, knowledge, or information of the pendency of said suit; nor did they make any appearance; nor was the said lot proceeded against by attachment, or other lawful proceeding *in rem*; and so he says that the court entering said decree had no jurisdiction of the person of the owner of said property, nor of the property, and had no power or authority to enter said decree.

Second. That the taxes on said lot for the year 1850, and for every year from 1844 to 1856, were duly and regularly paid, and discharged to the proper officer.

By sections 506 and 507, of the Code, it is provided that the purchaser at a tax sale, may, at any time after six months from the day of sale, file his petition in the district court, as in case of a foreclosure of mortgage, the notice and service to be the same "as in case of a mortgage;" but if the owner of the land is not known, the action may be brought against the land itself—the service being made, as in a case of a non-resident. And then, by the next section, (508), it is provided that the court shall have jurisdiction of such actions as in chancery, and the decree therein shall be conclusive in the same degree as in other actions.

Without now determining what would be the effect of such a decree, where the proceeding is against the land itself, if the land shall be fully and clearly designated and described, we shall confine ourselves to the case now before us. The defendant, in his rejoinder, in substance, avers that this lot was not proceeded against by any proper or sufficient designation in law, nor by any legal proceeding *in rem*; that the plaintiff's action was against lots 1, 11, 12, 15 and 17, in block 962, and other lots in the city of Burlington. If this averment is true, can said decree conclude the defendant, or any person claiming title to this lot, adverse to the title under the tax sale? We think not.

We need not advert to the strictness required in all the States, where it is sought to divest title on account of the non-payment of taxes. A strict compliance of the law is uniformly regarded as essential. Nor need we do

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more than state, that if the court rendering the decree has no jurisdiction of the person of the defendant, he will not be bound; and this, whether the court is one of general or of limited jurisdiction. And so, if the proceeding is against property, it cannot be condemned, and will not be bound, unless it is properly and legally brought before the court.

If a plaintiff in such an action, therefore, would proceed against the property itself, it should be designated and described, not only in his notice, as contemplated in sections 506, 1715, and 2083, of the Code, but also in the publication contemplated in sections 507 and 1725. And we are clearly of the opinion, that the court cannot acquire jurisdiction, and the property will not be bound, where the proceeding is against certain named lots, *and others*, (not naming them), as to the property or lot not named or designated. Title cannot be divested by a proceeding thus devoid of the essential elements to confer jurisdiction. It might as well be said, that the defendant was concluded by a judgment rendered in a suit brought against Richard F. Barrett and others—the others not being named or served. To bind the property, it should be proceeded against, at least by description, and the notice should specify and make known, that the plaintiff is seeking to foreclose the equity of redemption of the owner, in and to said property—naming it—so that the owner may have an opportunity of knowing that his title is about to be divested. To our minds, it would be subversive of every legal principle, and contrary to the plainest dictates of right and good conscience, to conclude the owner of land by a proceeding of this nature, where he has had no formal notice, and where the constructive notice fails to designate or make known to him, that his property is sought to be taken from him. We have yet to find a case or an authority, which goes so far as to hold, that property can be condemned, and the title to it changed, by a proceeding *in rem*, which does not refer to, and specify it, so that those interested may have an opportunity to de-

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fend. It has not escaped our observation, that in numerous instances, these suits are prosecuted against a number of tracts of land or town lots, (the notice as published naming one or more lots), and concluding, "and other lots, and the unknown owners thereof." Upon what principle, the lots or tracts, not named, can be bound, or how, as to those, the decree can pass any title, we cannot comprehend.

If it be true, then, as averred in the rejoinder of plaintiff, that the action of Barlow was instituted and prosecuted against certain named lots, and others, (not naming the lot now in controversy), we do not think the decree was effectual in passing the title to him, as to this lot; and as a consequence, we must conclude that the plaintiff could acquire no title through him.

But, we further inquire, can the defendant prove that the taxes were, in fact, paid for the year 1850, (the year for which the lot was sold), and thus defeat the plaintiff's title. Aside from the effect of the decree, foreclosing the equity of redemption, this proposition would not perhaps admit of much doubt. It is said "that the delinquency of the owner to pay the taxes, is the *essential* fact upon which the power of sale rests. The right to sell is founded on the fact of the non-payment of the tax. If the tax be paid before the sale, the lien of the State is discharged, and the right to sell no longer exists. Where the owner has performed all of his duties to the government, no court will sanction, under any circumstances, the forfeiture of his rights of property. The law was intended to operate upon the unwilling and negligent citizen alone. The legislative power extends no further. The sale involves an assertion by the officer, that the taxes are due and unpaid, and the purchaser relies upon this, or on his own investigations, and his title depends upon its truth. The title of the purchaser is *contingent*, so far as it may be affected by proof, establishing the fact that the tax has been paid before the sale was made. This is an *implied*

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condition, annexed to every grant of this kind, founded on a sound construction of the law, the power of the government in collecting taxes, and the principles of natural justice. Therefore, every purchaser takes a deed subject to the condition, that the taxes have not been paid; and if his title is defeated, he must look to the government for that relief which such a case may require." Blackwell on Tax Titles, 484.

In New York, the statute provided that the conveyance from the comptroller, should vest an absolute estate *in fee simple*, in the purchaser at the tax sale. It was held, however, in *Jackson v. Moore*, 18 Johnson, 441, that notwithstanding such sale and deed, no title would pass, if the taxes were in fact paid. Says Woodsworth, J., "the right to sell, is founded upon the fact of non-payment; the returns made to the comptroller are not conclusive *evidence of the fact*, but only *prima facie*, and such as will justify him as an officer, in the discharge of his duty. The *validity* of the sale and conveyance, are necessarily to depend on the contingency of non-payment; when this is drawn in question, it is competent to prove payment, and by so doing, no rule of law is violated; it is not permitting parol evidence to impugn or destroy a written contract, but is consistent with the deed; and if a deed is thereby defeated, it arises upon the proof of a fact, upon which, by law, the operation of the deed was made to depend, at the time it was executed."

Indeed, aside from the effect to be given to the decree, there would seem to be but little doubt, upon authority, that payment of taxes before sale, might be shown, and if proved, would defeat the purchaser's title. If the court rendering the decree, however, has jurisdiction of the person of the defendant, or the property, can the owner be allowed afterwards, to show such payment, or is the decree conclusive. As already stated, the law is, that such a decree is conclusive in the same degree as in other actions. Code, section 508. And section 509 provides

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that when by the mistake or wrongful act of the treasurer, land has been sold on which no tax was due at the time, the county is to hold the purchaser harmless, by paying him the amount of principal and interest to which he would have been entitled, had the land been rightly sold; and the treasurer and his sureties, will be liable for the amount to the county, on his bond, or the purchaser may recover directly of the treasurer.

This section, we think, must apply to those cases where the payment is shown before the decree. After decree, where the court is shown to have jurisdiction, we think, the owner is concluded, and cannot be permitted to prove the payment. Any other construction, would take from the judgment, that conclusiveness which the law expressly says shall be given to it. As the non-payment is the essential fact, upon which the power to sell vests, the decree necessarily includes within it, the finding of that fact, and in the absence of fraud, must be conclusive.

One further point is worthy of consideration, before closing this opinion. This lot was sold for the taxes due for the year 1850. When the sale took place does not appear. Prior to the taking effect of chapter seventy-four of the laws of 1853, and after the Code went into operation, there was no power to sell lands for the delinquent taxes for any year prior to 1851. If, therefore, the sale in this instance, was made prior to January 1, 1854, it was without authority and void, and plaintiff could acquire no title. And, *quare*: under a sale for such delinquent taxes, can the purchaser proceed to foreclose, by action, in the same manner, as provided for in the Code. The right is not expressly given by the law of 1853, and it is perhaps not clear that it was intended to be given. But as to this, we express no further opinion.

Judgment reversed.

Von Puhl et al. v. Rucker et al.

VON PUHL *et al.* v. RUCKER *et al.*

In a proceeding by *scire facias*, to revive a judgment in an action of right, and show cause why execution should not issue, a party to whom the property has been conveyed by the judgment defendant, subsequent to the judgment, and who is in possession, is a proper party defendant with the defendant in the judgment.

A party who receives title to real estate after the rendition of a judgment in an action of right, against his grantee, is not an innocent purchaser, without notice, and the plaintiff in the judgment is entitled to revive it, and have execution against such party.

In an action of right, the judgment is notice to all persons of the right of possession, as between the plaintiff and defendant.

The judgment on the *scire facias*, where it is sought to revive a judgment in an action of right, is, that the plaintiff have execution against the person succeeding to the possession. It is not a judgment of recovery.

Appeal from the Lee District Court.

TUESDAY, JUNE 15.

In April, 1851, the plaintiffs recovered judgment in an action of right against Ambrose Rucker, one of the defendants, for the possession of the north-west quarter of section ten, township sixty-six north, of range five west, lying in Lee county. No execution was issued on the judgment, and in the meantime, Rucker sold out his claim and possession to Garry Lewis, who, at the time of the commencement of this suit, claimed the land and improvements, and refused to surrender the possession to plaintiffs. In September, 1857, this suit was brought, to revive the judgment, and to have execution thereon, against Rucker, the original defendant, and Lewis, the tenant in possession. Lewis demurred to the petition, assigning for cause of demurrer, that he was improperly made a party. The court sustained the demurrer, and dismissed the suit as to Lewis, and the question as to the correctness of this ruling of the court, is the only one presented for consideration.

Rankin, Miller & Enster, for the appellants, cited the

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error in the giving of the instruction asked by plaintiff, and in refusing that asked by defendant. The plaintiff, by merely charging defendant with having unlawfully issued the execution, cannot cast upon him the burden of producing the judgment to support it. Having alleged that defendant issued the execution without lawful authority, he must first make out, at least, a *prima facie* case against him. He cannot first call upon defendant to disprove the charge made against him. Viewing it in this light, the instruction given was erroneous. It must, however, be taken in connexion with the fact appearing by the record, that the docket of the defendant as justice of the peace, had been given in evidence to the jury. This docket it was in the power of plaintiff to notify the defendant to produce, that the fact might be determined from it, whether any judgment had been rendered to authorize the execution. It was only when produced and given in evidence, that the burden of proof was changed to defendant, and he was required to show the judgment, if any had been rendered. This was all the evidence necessary to exculpate the defendant from all liability. If his docket failed to show it, the conclusion was a necessary one, that the execution issued without authority, as alleged by plaintiff.

So the instruction asked by defendant, and refused by the court, may in a certain sense have been correct; but after the introduction of the docket, and of the judgment against plaintiff in the name of the State, although these facts alone did not prove that there was no judgment to authorize the execution, yet, when introduced, the burden of proof was changed to defendant, and if there was any such judgment, or if he claimed there was any such judgment, it was his duty to produce it.

The court was further asked to charge the jury, that "if they believed that the execution was issued on the judgment given in evidence, they must find for the defendant." This instruction was properly refused. The judgment against the plaintiff was in the name of the

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State: the execution was in the name of Thomas Bryan. The jury could not well have believed that the execution issued on the judgment. If they were likely to be induced to believe so, it was the duty of the court to inform them that the judgment did not authorize the issuing of any such execution upon it, and if it was issued upon it, it was so issued without authority.

Judgment affirmed.

GAYLORD V. SCARFF.

In a proceeding to foreclose the equity of redemption in lands sold for taxes, against the property itself, the land should be designated and described, not only in the notice contemplated in sections 506, 1715 and 2083 of the Code, but also in the publication provided for by sections 507 and 1725.

Where the proceeding to foreclose is against the land itself, under section 507 of the Code, and it is against certain named lots of land, and others, not describing them, the court will not acquire jurisdiction as to the parcels of land not described, nor will the property be bound by the decree rendered in such proceeding.

Where it is sought to divest the title to real estate, on account of the non-payment of taxes, a strict compliance with the law is essential.

If the court rendering a decree, has no jurisdiction of the person of the defendant, he will not be bound, and this, whether the court is one of limited or general jurisdiction. And so, if the proceeding is against property, it cannot be condemned, and will not be bound, unless it is properly and legally brought before the court.

In a proceeding against real estate, to foreclose the equity of redemption, under a tax sale, in order to bind the property, it should be proceeded against by description, and the notice should specify and make known, that the plaintiff was seeking to foreclose the equity of redemption of the owner in and to said property, describing it, so that the owner may have an opportunity of knowing that his title is about to be divested.

Under section 508 of the Code, a decree of foreclosure, under a tax deed, is conclusive in the same degree as in other actions.

In a proceeding to foreclose the equity of redemption under a tax deed, the defendant may show that the taxes were paid prior to the sale.

Section 509 of the Code, applies to those cases where payment of the taxes before sale, is shown prior to the rendition of the decree.

After the rendition of a decree of foreclosure under a tax deed, where

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the freehold is to be made a party. 7 Bacon's Abridgement, title *Scire Facias*, 141.

In *Hanson v. Barnes*, 3 Gill & Johnson, 359, the general principle is admitted to be, that "where a new person is to be benefitted or charged by the execution of a judgment, there ought to be a *scire facias* to make him a party." The question before the court in that case, however, was whether the death of the defendant before the levy of a *feri facias*, issued and in the hands of the sheriff before his death, rendered a *scire facias* against the heirs and terre-tenants necessary; and whether a sale under the *feri facias* thus issued and thus levied, passed any title to the purchaser. The principle announced, must be understood as applying only in case of the death of the original defendant. If a *scire facias* against the terre-tenants were necessary in every case of alienation of the property, then successive alienation, or change of possession, might defeat the plaintiff *ad infinitum*. After the process is regularly in the hands of the officer for execution, it will not be necessary, even in case of the death of the defendant, and descent cast, to make the heirs and terre-tenants parties. 3 Gill & Johnson, 366.

It is objected by the defendant, Lewis, that the plaintiffs are not entitled to revive the judgment, and have execution thereon against him, for the reason that he is an innocent purchaser, without notice, and has acquired his title to the land from Rucker, subsequent to the judgment sought to be revived. The judgment was notice to all persons of the right of possession as between the plaintiffs and Rucker; and as the demurrer admits that Lewis purchased of Rucker, the original defendant, since the judgment, and holds possession under him, he has no claim to be considered a purchaser without notice. The judgment determined all questions of the right of possession, so far as Rucker was concerned. The plaintiffs had the right to have this possession delivered to them on this judgment. Upon this demurrer, Lewis stands as in the place of Rucker, having received his possession from him;

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and, although it may not have been necessary for the plaintiffs to make Lewis a party, in order to turn him out, yet, having done so, we do not see that he is entitled to complain. Having made himself a party, in fact, by his purchase and entry into possession under Rucker, he cannot object to being made a party of record; at any rate, so far as to have execution awarded against him on the *scire facias*.

The judgment on the *scire facias* is, that the plaintiff have execution against the person succeeding to the possession. It is not a judgment of recovery. 4 Monroe, 731.
Judgment reversed.

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By pleading over and going to trial, a party waives his demurrer to the pleadings demurred to.

A motion to strike from a pleading redundant or irrelevant matter, is a matter within the discretion of the court; and the overruling such a motion is not a ground of error.

Where a promissory note is lost after suit brought, the attorney for the plaintiff is a competent witness to prove its loss, and that a copy of the note annexed to the petition is a true copy; and after such proof, the copy of the note is admissible in evidence.

The district court is not bound to give or refuse instructions in the form and terms presented by a party, but may modify them so as to meet the views of the court upon the law; or add to such instructions such matter explanatory of them, as the court may deem proper to a right understanding by the jury.

It is no ground of error that the district court has modified, or added explanations, to instructions asked for by a party; but if the instructions as modified or explained, do not express the law, they are subject to review.

It is the duty of a party to call the attention of the court, to the specific matter in instructions to which objection is made, rather than except in general terms, to the entire instructions.

Where in an action against the indorser of a promissory note, the defendant asked the court to instruct the jury as follows: "1. That before the indorser of a promissory note, is liable for the payment thereof, he must have due notice of its dishonor and protest; 2. That before

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an indorser can be held liable for the payment of a promissory note, without such note being first duly protested or dishonored, the jury must find that the note was given for the accommodation of the indorsee only, and that he has the sole interest in the payment, and must ultimately pay the same;" which instructions the court gave with the following addition: "This is true; but if the jury find that the indorser waived protest and notice, or, after the day of payment, expressly promised to pay the note, or indorsed and passed it for a valuable consideration, he is liable in this suit;" and where the defendant also asked the court to instruct the jury as follows: "That before the indorser of a note, without notice of its dishonor, can be held liable on a subsequent promise to pay, it must be shown that he made the promise with a full knowledge of the fact, that the note was not duly dishonored"—which instruction was given by the court, with an addition, as follows: "But the jury must take into consideration all the evidence and facts, in order to determine whether the defendant had notice of the note being protested; and if the jury find that defendant, before its maturity, requested that the note might not be put in bank, to avoid a protest, he cannot take advantage of the fact, that it was not duly protested, and that he was not notified;" and where the defendant further asked the court to instruct the jury: "That the law will not infer that an indorser who promises to pay the note, after its maturity, had knowledge that it was not duly presented;" which instruction was given with the addition: "But if the jury find that the maker was insolvent, and that the indorser knew and acknowledged that fact, and stated to the plaintiff, that in consequence thereof, it was not necessary to put the note in bank, and make additional costs by protest, &c., he can take no advantage of the want of demand and protest;" and where it appeared that the court and the counsel of the defendant, treated the instructions as implying that the term "protest and notice," included a *demand* of payment: *Held*, That there was no error in the instructions.

Appeal from the Lee District Court.

WEDNESDAY, JUNE 16.

Action was on a promissory note, against the indorser. The plaintiff alleges that the defendant indorsed and delivered to him, in payment for goods sold and delivered to defendant, a promissory note made by Phillips & Co., and payable to the said Striblen. The defendant demurred to the petition, which demurrer being sustained, the plaintiff amended his petition, to which petition a sec-

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ond and third demurrer was filed—both of which were overruled. The defendant then answered the petition, and the issues being joined, the parties proceeded to trial. Verdict for the plaintiff, and judgment thereon. The defendant appeals. The questions in the cause arise principally on the instructions given to the jury, which, with the other necessary facts, will be found in the opinion of the court.

William Edwards, for the appellant.

I. Demand and notice in every case are conditions precedent to the holder's right to recover on a bill or promissory note, as against the drawer of the former, or indorser of the latter. And in every case, the indorser of a promissory note, or the drawer of a bill, as the case may be, is entitled to strict notice of such demand, and notice of the non-payment, or dishonor thereof. Session Laws of Iowa, 1853, chapter 108, section 3; Story on Promissory Notes, 3d ed., sections 198, 265; Story on Bills, section 346; Chitty on Bills, 10th Am. from 9th Lond. ed. 353, 359, and notes; *Smedes v. the President and Directors of the Bank of Utica*, 20 Johnson, 371; *Berry v. Robinson*, 9 Ib., 121; *French v. the Bank of Columbia*, 4, Cranch, 164; *Ransom v. Mack*, 2 Hill, 590; *Monroe v. Easton*, 2 Johnson's Cases, 75; *Griffin v. Goff*, 12 Johnson, 423, *May v. Coffin*, 4 Mass., 341; *Aubin v. Lozans*, 2 McCord, 134; *Butler v. Denham*, 2 Ib., 350; *Williams v. the Bank of U. S.*, 2 Peters, 96; *Warder et al v. Tucker*, 7 Mass. 449.

II. A subsequent promise of the indorser of a promissory note, without notice of protest or dishonor thereof, to pay the same, after due, will not render such indorser liable as such, unless, made without fraud, deception or misrepresentation on the part of the holder, and with full knowledge of the facts, that no demand had been made of the maker, and no notice of protest and dishonor of same had been given. *Thornton v. Wynn*, 12 Wheaton,

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183; Story on Promissory Notes, 477, note 1, and sections 272, 361.

III. A stipulation by the indorser of a note, to waive notice of demand of payment, does not dispense with the demand itself. *Backus v. Sheperd*, 11 Wendell, 629.

IV. Demand of payment of a note of the maker, is of much more importance, than notice to the indorser of dishonor. Chitty on Bills, 10th Am. from 9th London ed. 389, 390; Story on Promissory Notes, section 272.

V. The death, bankruptcy, or known insolvency of the maker of a note, is no excuse for want of demand and notice by the holder, nor is an agreement between the parties, that the note should not be paid when due, or until a given time, any excuse. Chitty on Bills, 10th Am. from 9th London ed., 449, 450, and notes and authorities cited; *Esdaile v. Snowerby*, 11 East, 117; Story on Promissory Notes, 203, 241; Chitty on Bills, 386; *Crossin v. Hutchinson*, 9 Mass., 205; *Garland v. the Salem Bank*, 9. Ib. 407; *Jackson v. Richards*, 2 Caines, 343; *Barton v. Baker*, 1 Sargeant and Rawle 334; *Sampson v. Dillwoy*, 10 Mass., 52; *Farnum v. Fowle*, 12 Ib., 89; *Gorton v. Dallkin*, 6 Greenleaf, 476; *Shaw v. Reed*, 12 Pickering, 132; *Lawrence v. Langley*, 14 New Hampshire, 44; *Robson v. Oliver*, 10 Adolphus and Ellis, N. S. 704; *Hunt v. Wadleigh*, 26 Maine, 271.

VI. Where it is incumbent on the holder to present a bill or note for payment, at a precise time, and he neglects to do so, he will lose his remedy as against the indorser, as well upon the bill or note, as upon the consideration or debt for which it was given or transferred. Chitty on Bills, 354, and note 2; E. H. L. R. 391; *Bridges v. Berry*, 3 Taunton, 130; Story on Promissory Notes, section 203, note 4.

VII. A party can never be held as primarily liable as indorser on a promissory note, unless the note was made for the express benefit and accommodation of such indorser and he must be the party ultimately bound to pay such note, without recourse on the maker or any other individ-

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ual, on account of such payment. Story on Promissory Note, section 128, note 1; 145, sections 129, 135, note 2; section 203 and note 4; sections 195, 268, 372.

VIII. A special agreement between the holder and the indorser of a promissory note, waiving due notice, presentment for payment, and notice of dishonor of such note, is always to be construed strictly, and cannot, by implication, be extended beyond the fair import of the terms, nor is a waiver of notice of dishonor, a waiver of demand. Story on Promissory Notes, section 272; *Union Bank v. Hyde*, 6 Wheaton 572.

Rankin, Miller & Enster, for the appellee. [The reporter found no brief of the counsel for the appellee upon the files of the court.]

WOODWARD, J.—The first error assigned, is to the overruling defendants second demurrer to the plaintiff's petition and amended petition. After this decision by the court, the defendant answered, and then rejoined to the plaintiff's replication, joined issue, and went to trial. It has been often decided, that, by pleading over and going to trial, the defendant waives his demurrer to the petition. See 3 Iowa, 150, 209, 582. The same remark applies to the second assignment, which is to the overruling the third demurrer of defendant, which objected to the sufficiency of the amended petition.

The third error assigned, is the overruling the defendant's motion to strike out that part of the plaintiff's replication which alleges that defendant was principal in the note. There was no error in this ruling. The averment was an immaterial one. It was a mere averment of the law, and as such would more properly have been omitted; and if it was so voluminous as to incumber the record, the court could properly order it stricken out; but it is not a matter of error. In the original petition, the plaintiff states the facts, and shows the actual position and relation of defendant, whilst the matter objected to occurs

in the replication. It was a question of practice only, whether it should be stricken out, which lay within the discretion of the court.

The fourth error is, upon overruling defendant's objection to the introduction of the evidence of one Garrard, to prove the loss of the note. The bill of exceptions shows that the plaintiff called Garrard as a witness, and that he testified, that he was the attorney of plaintiff; that the note had been in his hands; that he brought suit upon it; that the copy annexed was a true copy; and that the original had been lost, since the commencement of the action, &c. upon which plaintiff proposed to read the copy to the jury. The defendant objected, but the court permitted it to be read. We do not perceive the weight of this objection, and the party does not throw light upon it, by his argument. There is no objection to the witness pointed out, and he was clearly admissible, to show that the note was lost, and to prove its contents. It is not an action brought on a lost note, but the instrument is lost after suit brought. The evidence was proper, and its admission would not debar the court from taking such order as it saw requisite, for the security of the defendant against the lost note.

The fifth and sixth assignments, relate to the refusal of the court to give certain instructions to the jury, in the terms in which they were asked, and without modification; which instructions, with the modifications of the court, *in brackets*, are in substance, as follows:

I. "Before an indorser of a note is liable for the payment thereof, he must have due notice of its dishonor and protest. [This is true; but if the jury find that the indorser waived protest and notice, or after the day of payment, expressly promised to pay the note, or indorsed and passed it for a valuable consideration, he is liable in this suit.]"

II. "Before an indorser can be held liable for the payment of a promissory note, without such note being first duly protested or dishonored, the jury must find that

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the note was given for the accommodation of the indorser only, and that he had the sole interest in the payment, and must ultimately pay the same." This was given with the same modification as the first instruction.

III. "Before the indorser of a note, without notice of its dishonor, can be held liable upon a subsequent promise to pay, it must be shown that he made the promise with a full knowledge of the fact, that the note was not duly dishonored. [But the jury must take into consideration all the evidence and facts, in order to determine whether the defendant had notice of the note not being protested; and if the jury find that defendant, before its maturity, requested that the note might not be put *in bank*, to avoid a protest, he cannot take advantage of the fact, that it was not duly protested, and that he was not notified."]

IV. "The law will not infer that an indorser, who promises to pay the note, after its maturity, had knowledge that it was not duly presented. [But if the jury find, that the maker was insolvent, and that the indorser knew and acknowledged that fact, and stated to the plaintiff, that in consequence thereof, it was not necessary to put the note in bank and make additional costs, by protest, &c., he can take no advantage of the want of demand and protest."]

It would seem that the objection of the defendant, is to the fact that the court did not give the instructions in the form requested, but added modifying, or explanatory matter, and not to the additional matter itself. This is indicated in the assignment of errors. The fifth alleges the error to be, "in refusing to give the instructions to the jury, as asked by defendant." And the sixth alleges, the error to consist "in making the modifications to the instructions asked for by the defendant." We have heretofore held that the district court was not bound to give or refuse instructions, in the form and terms presented by counsel; but that the court was at liberty to modify them, so as to meet their views upon the law, or to add such matter explanatory of them, as the

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court deem proper for a right understanding by the jury. It is, therefore, no ground of error, that the court has made such modifications or explanations; but if, as so qualified, they do not express the law, they are subject to exception.

In the present case, the court did not, properly speaking, qualify or change the propositions offered, but added such matter as it conceived would assist the understanding of the jury, and apply the instructions more nearly to the actual case. The instructions in the form presented by the defendant, were broad and general propositions, and were destitute of the expression of those circumstances which would connect them more nearly with the case on trial. Thus, they express only the general proposition, that an indorser is entitled to have demand made, and notice given, but there is much to show that the case turned on those circumstances which would take it out of the general rule as claimed by defendant; and it was right that these latter should be laid before the jury, as well as the former; for the former only being given, would tend to mislead the jury in the trial of the cause before them. The court added only those qualifications which applied to the actual case. There was no error in this.

But the defendant does not seem to contest the law contained in the qualifications by the court, generally, but it would appear from his argument, that he objects that the court instructed that the indorser would be liable, if he waived protest and notice, without including the *demand* in this proposition. He aims to put it upon the ground that the court held, that a waiver of the protest and notice, would leave him liable, although he did not waive the demand. But we do not so understand the instructions of the court, and it does not appear that they were so taken on the trial; nor that even the defendant so regarded them during the progress of the cause. At the conclusion of all the instructions and explanations, as contained in the bill of exceptions, he excepts to them altogether, specifying none. And then, in the assignment of errors, he assigns

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the refusal to give them as asked, and the giving them with modifications ; but does not assign any matter of law contained in them, nor any specific matter. And again : in the demurrers to the petition, and amendment thereto, he alleges that they do not aver that the note was protested, and that notice was given to him, but does specify the want of averment of demand. And finally, throughout the cause, both the court and the defendant's counsel, treat it in such a manner as to imply that the terms " protest and notice," were taken to include the demand, and that this was not made a point. It appears to us, that the cause was understood in this manner by all concerned upon the trial, and there was no liability to error in this respect. In this state of things, it was the duty of the defendant, to call the attention of the court to the specific matter, and to prevent the mistake, rather than except in merely general terms, to the entire instructions, and thus permit the misapprehension, (if there was one), to run throughout the case.

Upon the whole view, we are induced to hold that there was no error in the judgment.

Judgment affirmed.

SEEVERS, Adm'r, v. HAMILTON.

Where an attorney recovers a judgment in his own name, on a note or claim sent to him for collection, and the amount of which is made out of property of the defendant, and paid over to the client, the attorney, upon being subsequently compelled to refund the money so paid to the client, to a party having a prior lien on, or right to, the property sold to satisfy the judgment, may recover back from his client the money so collected and paid on the judgment.

In such a case, if the judgment obtained in the name of the attorney, has been satisfied of record, the attorney, in order to recover, must make the client whole, by showing that the satisfaction of the judgment has been set aside, or that there is, in some form, recourse against the original defendant, within the power and control of the client.

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Appeal from the Mahaska District Court.

THURSDAY, JUNE 17.

The plaintiff sets forth in his petition, the following state of facts, on which he seeks to recover of the defendants: That in January, 1844, the defendant, Rebecca G. Hamilton, residing in the State of Ohio, was the widow of John Adamson, late deceased; that among the goods and effects of said Adamson, at the time of his death, were found three several promissory notes, made by one William Downing, of the State of Kentucky, and payable to said John Adamson; that these promissory notes were taken possession of by the said Rebecca, as the widow of said Adamson, and were by her placed in the hands of George Trotter, the plaintiff's intestate, who was a practising lawyer in Kentucky, for collection, with directions to take all legal steps to secure their payment; that the said Trotter brought suit on the said notes, in his own name, and recovered judgment against Downing; that execution issued on the judgment, was returned "no property found;" that Trotter thereupon commenced certain proceedings to subject to the payment of said judgment, the interest of said Downing in certain real estate and slaves, held by his mother as her dower estate during her life, and such proceedings were had, as by a decree of the proper court of Kentucky, the proceeds of the said real estate and slaves, sold on the petition of the heirs, by order of the court, on the death of his mother, were directed by said court to be paid to the said Trotter, in satisfaction of said judgment; that in the meantime the said Rebecca had intermarried with the defendant, Francis G. Hamilton, and the money so received by the said Trotter, from the sale of said real estate and slaves, was by him, on the second of June, 1850, paid to the said Francis G. Hamilton, as the husband of the said Rebecca—he, the said Francis, at the time of receiving and accepting the same, well knowing the source

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from which the same had been obtained; that afterwards, in the year 1855, one Selim Downing commenced a suit in the courts of the State of Kentucky, setting up and asserting for himself, a prior lien and claim upon the interest of the said William Downing in the real estate and slaves, the proceeds of which had been by said Trotter, subjected to the payment of said judgment, and alleging that the said proceeds had been wrongfully and illegally paid to said Trotter; that such further proceedings were had in said suit, that by a judgment and decree of the circuit court of Fayette county, Kentucky, the said Trotter was condemned to pay to said Selim Downing, the sum of three hundred and five dollars, besides costs, as, and for, the proceeds of the said real estate and slaves, so subjected by him to the payment of the said judgment against William Downing; and that he had since paid the same, amounting in the whole, with interest and costs, to five hundred dollars, which amount the plaintiff claims to recover of said defendants.

A demurrer to this petition was overruled by the court; and it is agreed by the parties that the question for adjudication is, whether the ruling of the district court was correct.

Samuel A. Rice, for the appellants.

W. H. & J. A. SeEVERS, for the appellees.

STOCKTON, J.—It is no obstacle to the right of the plaintiff to recover, that the suit against Downing was prosecuted in the name of Trotter, as plaintiff. The notes on which the suit was brought, were payable to bearer, and the action upon them, by Trotter, in his own name, was susceptible of explanation. It is shown that it was so brought, to obviate the necessity of a bond for costs by Mrs. Adamson, she being a non-resident of the State. We cannot say that such a step is unusual among attorneys who have claims sent to them from a distance for collec-

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tion ; or that it is so out of the usual and proper course of proceedings, as to subject them to the charge, or to the consequences of a conversion. However this may be, it is shown in the present instance, that there was neither in fact nor intention, any conversion by Trotter, because the money received by him on the judgment, was immediately paid to defendants.

It is urged, as an objection to the right of the plaintiff to recover, that the notes on Downing, were the property of the administrator of Adamson ; that the administrator and heirs were entitled to the proceeds of the judgment ; and that the widow, by taking possession of the notes, became an executor *de son tort*. We think the defendants are not entitled to make this objection, and it comes from them with a very bad grace. Trotter received the notes for collection from the widow, and for all the purposes of this suit, he was entitled to regard her as the rightful owner of them. Having received the money from Trotter, the defendants cannot resist his right to recover it back, on the ground that the widow had no right to the notes, or to the proceeds of the judgment against Downing.

The right of Selim Downing to recover from Trotter, was determined by the courts of Kentucky, and the question with us is, not whether it was correctly determined, but whether he did in fact recover or not. If he did, and Trotter paid the judgment, we cannot, in this action, inquire whether the decision was correct or not. So, the right of Trotter to institute proceedings against William Downing, to have his interest in the dower estate of his mother, subjected to the payment of the judgment against him, is not for us a matter of inquiry. He did institute such proceedings, and recovered the money, which he applied in satisfaction of the judgment ; and the defendants, by receiving the money from him, after he had so recovered it, recognized and ratified his doings, so far as they can be considered as having notice or knowledge of them.

It is also objected by defendants, that the payment of

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the money to them by Trotter, was a voluntary payment by him, with a knowledge of all the circumstances; and such being the case, the money cannot be recovered back. We do not concur in this view. Trotter, when he received the money, was under obligations to pay it to defendants, and he could, in no way that we see, have avoided his liability, except upon a claim and showing, that it should rightfully go, as has been suggested, to the administrator of Adamson, and not to his widow. But, having received the notes from the widow, if no other claim was interposed, Trotter was bound to pay it over to her when collected. It was money had and received by him for her use.

The remaining objection made by defendants is of more importance, and, we think, was good cause of demurrer. The plaintiff does not aver or show that he is able, nor does he offer, to transfer to defendants, the claim upon Downing, neither in the shape of a judgment against him, nor otherwise. Mrs. Hamilton had placed in Trotter's hands the notes—the evidence of her demand upon Downing. These notes were merged in the judgment, which has been satisfied of record. Mrs. Hamilton is entitled to be made whole; the notes cannot be returned to her; the judgment has been satisfied; and even if the satisfaction had been set aside, and the judgment were in full force, it is in Trotter's name, and subject to the control of his administrator. Before the plaintiff can recover of defendants the money paid them by Trotter, this judgment must be transferred to them in full force. Upon a showing that Trotter has been required to refund to Selim Downing, the money received from the sale of William Downing's interest in the dower estate of his mother, the plaintiff may be enabled to have the satisfaction entered of record set aside, or he may, in some appropriate proceeding, recover another judgment against William Downing.

This duty, we think, devolves upon the plaintiff. Mrs. Hamilton has once paid Trotter for his services, as her attorney in procuring the judgment, which, without any fault of hers, and without her procurement, but by the ac-

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tion of said Trotter, has been extinguished. It would be a hardship on her, should she be required to pay a second time for the services of an attorney to revive or reinstate this judgment. She should not, in our opinion, either bear the burden or run the risk of such renewal. She is entitled to be made whole; she must be placed in a position to enforce the collection of her claim upon William Downing, if he is of sufficient ability to pay it.

Upon the payment of the judgment against him by Selim Downing, Trotter had his recourse, either against William Downing, whose indebtedness to Adamson had been extinguished by the satisfaction of the judgment against him in Trotter's name, or against the present defendants, to whom the money collected had been paid. We hardly think the plaintiff should be required, first, to seek indemnity from William Downing, and to enforce payment from him. He may resort, first, to his action against defendants, to whom he had paid the money. They are the ones principally and ultimately responsible to plaintiff's intestate. But to entitle him to recover, it must be shown that the satisfaction of the judgment against Downing is set aside, or that there is, in some form, a judgment against him, subject to defendants' control.

We are therefore of the opinion, that the district court erred in overruling the demurrer, for the cause aforesaid, and the judgment is reversed.

McGINNIS v. HART *et al.*

In an action on a replevin bond, for the non-return of property, as awarded, the petition and other papers in the replevin suit, are competent evidence to sustain the action on the part of the plaintiff.

By answering over, a party waives his objection to the pleading demurred to.

Where nothing is shown to the contrary, the appellate court will presume that an instruction given by the court below, was pertinent to the case. Where in an action on a replevin bond, the petition claimed as damages the

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sum of seven hundred dollars—the penalty named in the bond—and the petition, in stating the cause of action, alleged that the defendants did not return the property, but converted it to their own use, by means of which the plaintiff was damaged in the sum of two hundred and fifty dollars; and where judgment was rendered for the plaintiff for the sum of four hundred and forty-five dollars; *Held*, That the court did not render judgment for a greater amount of damages than was claimed in the petition.

Where in an action on a replevin bond, the court instructed the jury as follows: 1. That the records of the court show that return of the property was awarded in the former action; 2. That such award of return was still in force, and that unless defendants have returned the property or paid the value, they are liable; 3. That the petition of the plaintiff in the former suit, and the return of the sheriff, were proper evidence, and the latter conclusive of the facts therein stated, unless contradicted; 4. That if plaintiff proves that his property was replevied by H.—the principal in the replevin bond—and delivered to him, the defendants must prove the property returned, or paid for, or otherwise the verdict would be against them; and, 5. That in order to make a valid replevy, it was not necessary that the sheriff should actually take the property off from the premises of the defendant in replevin; but if the plaintiff in the replevin was present when the property was replevied, and consented to the manner of the replevy, and the kind of delivery made to him, he cannot now object to the validity of the levy: *Held*, That the instructions were not erroneous.

Appeal from the Wayne District Court.

THURSDAY, JUNE 17.

This action was commenced in October, 1856, upon a replevin bond, given by defendants to plaintiff, on 23d of January, 1854, in the penal sum of seven hundred dollars, conditioned to prosecute a suit in replevin brought by W. B. Hart against this plaintiff, and to return the property replevied, if a return should be awarded.

The petition lays the inducement and the breach, by stating the proceedings, in substance, as follows: In January, 1854, Hart sued out a writ of replevin to recover the possession of divers articles of personal property described in the writ, consisting of domestic animals, grain, and household furniture, and gave his bond above referred to, with K. M. Hart, as surety; by virtue of which writ,

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the sheriff took the said property from the possession of the present plaintiff, and delivered the same to the defendant, which is shown by the return of the officer thereon, which writ and return remain of record in the said court. Such proceedings subsequently took place in the aforesaid cause, that at the April term of the same court, A. D. 1856, a trial was had, and a verdict and judgment were rendered, adjudging that the property so replevied belonged to the said McGinnis, and it was ordered and adjudged that the said Hart, (then plaintiff,) return the said property to the said McGinnis, then defendant), it being the same with that in this petition set forth. And the plaintiff alleges that in September, 1856, he demanded of said Hart a return of the property aforesaid, according to the above mentioned order and decree, but that the defendant has hitherto neglected and refused to make return thereof, but has converted the same to his own use, so that the property has been lost to the plaintiff; by means of which he has been damaged in the sum of two hundred and fifty dollars, and by reason of which also, an action has accrued to him to recover the said sum of seven hundred dollars in the bond mentioned.

The defendants answered that the plaintiff became possessed of the aforesaid property, by and through a fraudulent and collusive purchase and sale; and they deny that they gave such replevin bond as alleged, and that the property was taken from the plaintiff and delivered to defendant; and deny his alleged damage. To the first proposition of this answer, there was a demurrer, for the cause that it pleaded matter which must have been tried in the former cause, and sought to go behind the judgment. The demurrer was sustained, and the defendants filed an amended answer, denying the execution of the bond; that there was a bond and a judgment of return of property; and that they obtained the property of the plaintiff on the writ; and aver that "the property in dispute in this cause, has been in the possession of plain-

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tiff, and defendants have no property of plaintiffs to return."

There was a replication, trial by jury, verdict and judgment for the plaintiff for the sum of four hundred and forty-five dollars. Defendants appeal. The questions made upon the bills of exception, appear in the opinion of the court.

J. Harris, for the appellant.

H. H. Trimble, for the appellee.

WOODWARD, J.—The error first assigned is upon the court allowing the plaintiff to read in evidence, the writ of replevin issued in the former suit in replevin by Hart against McGinnis; and the third assignment is to the allowing plaintiff to read in evidence the petition of said Hart, the plaintiff in replevin. The counsel have hardly laid open their objections, or rather the grounds of them, in their arguments in support of their views, and we shall aim only at a general examination of them. It is not very apparent what objection of weight, exists to the introducing the records of the action in replevin in evidence, in the present cause. On the contrary, this would seem to be necessary, of course. In any supposable case in which an action would lie upon a replevin bond, for the non-return of the property as awarded, how is the subject matter of the suit to be brought to view, and to be shown, but by the papers of the cause—the records themselves. Each paper does not contain a detail of all the others, so as to stand alone and independent, without reference to others. The bond, for instance, does not contain a long catalogue of items of personal property replevied, but the papers making the record, constitute the action.

In the present cause, the defendants deny the execution of a bond; deny that there is one; deny a judgment of return; and that the replevin plaintiff obtained the

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property on the writ. To meet these denials, and to support the plaintiff's petition and allegations, he introduces the former plaintiff's petition in replevin, to show that he prayed for a writ, and what property he sought; he offers the writ and return to show that a writ issued, what was taken upon it, and that the property was taken and delivered to the then petitioner. Thus the plaintiff's petition in replevin, the writ prayed for by him, and the doings of the officer of the law, brought about by plaintiff's prayer, are introduced as evidence. No objection to their competency is stated, and none is perceived, applicable to the present cause; and no occasion is suggested for entering into an examination of the circumstances in which similar papers are sometimes held inadmissible.

The second assignment relates to the sustaining plaintiff's demurrer to defendants answer. As the defendants amended, proceeded with the cause, and went to trial upon the amended answer, they waived their objection to the ruling. Besides this, their answer seems to have reached behind the judgment in replevin, and to have touched upon the merits of the former action, and thus to have been liable to the demurrer.

The fourth assignment is to the giving each and all of five instructions, requested by the plaintiff, and the substance of which was: 1. That the records of the court show that return of the property was awarded in the former action; 2. That such award of return was still in force, and that unless defendants have returned the property, or paid the value, they are liable; 3. That the petition of plaintiff in the former suit, and the return of the sheriff, were proper evidence, and the latter conclusive of the facts therein stated, unless contradicted; 4. That if the plaintiff proves that his property was replevied by Hart, and delivered to him, the defendants must prove the property returned, or paid for, or otherwise the verdict would be against them; and, 5. That, in order to make a valid replevy, it was not necessary that the sheriff should actually take the property off from the premises of the defendant in replevin; but

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if the plaintiff in replevin was present when the property was replevied, and consented to the manner of the replevy and the kind of delivery made to him, he cannot now object to the validity of the levy.

The necessity of some of these instructions is not very apparent, but they are not therefore erroneous. There was no impropriety in the court construing its prior records, and stating their legal effect, as requested in the first instruction, although they were to be offered in evidence to the jury. There is nothing showing that they were not so made evidence; and the necessary presumption is, that they were. It was also competent for the court to instruct that the order of return remained in force, and the defendants liable on their bond, unless the obligation had been discharged by a return, or by compensation; although the proposition would have been more complete, had the court added a reference to any other method of discharge, such as a release, or accord and satisfaction. But such an instruction would not be understood as limiting a discharge to the exact modes there named.

The third instruction is involved in the matter under the first and third assignments of error, relating to the admission of the petition, writ and return in evidence; the fourth is of similar substance to the second, and requires no other comment.

The fifth instruction is correct as a proposition. There is nothing shown in the case to make it applicable, but this court will assume it to have been pertinent, where nothing is shown to make the contrary appear. But it is objected to, as being erroneous, without a fact or any testimony stated, manifesting it as erroneous. If there was anything rendering it improper to be given, or erroneous as law, when applied to this cause, the testimony and the facts should have been set forth so far as to show this. We will venture a farther remark upon this instruction. A part of the defendants' answer alleges that Hart "did not obtain the property on the writ of replevin, and that the property has been in the possession of the plaintiff, and de-

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defendants have no property of plaintiff to return. This answer, with the fourth instruction, indicates that there was some question in the case relative to the manner of executing the writ of replevin, and the delivery or taking possession of the property. It is necessary for the court to state that there is nothing in the case explaining this. There is nothing in the pleadings farther than that above stated, which is too brief and meagre; and nothing by way of statement or of evidence, which serves to throw light upon the matter, or to give it point. This may have been important to the defendants, and certainly, if the property were not taken from the plaintiff's possession, and if it were not delivered to the defendant, Hart, this should have had a material influence upon the finding of the jury and the judgment of the court, and the defendants should not be charged with the value of it. But the defendants have brought nothing in the case to this court, which, in the least, indicates how this was. If there were an agreement between the parties, that the property should remain in the hands of the defendant, until the question of right was heard, it should have been shown in a bill of exceptions, but as nothing of the kind intimated is brought to a knowledge of the court, it can give the party no relief.

The fifth, and last assignment of error, is, that the court rendered judgment for a greater amount of damages than was claimed. There is no good foundation for this assignment. The plaintiff claims seven hundred dollars—the penal sum in the bond—both in the commencement and the close of his petition. In the course of his statement of his cause of action, and the breach of the condition of the bond, he alleges that the defendants (plaintiffs in the former action), did not return the property, but converted it to their own use, by means of which he has been damaged in the sum of two hundred and fifty dollars; but the petition proceeds to state further, and to claim the sum first named, that is, the penalty of the bond. In the manner in which the petition is constructed, this allegation of

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damage in the lesser sum, must be regarded as one of several items, or causes of damage, and not as excluding the idea of damage from other sources, or in other respects. The damages recovered are within the amount claimed, and there is no error herein.

There being found no error in the rendition of the judgment, and in the proceedings, the same are affirmed.

COX & SHELLEY v. GARBER *et al.*

In January, 1852, S. & S., attorneys at law, received for collection from G. E. G. two notes against B.; B. being unable to pay at once, assigned to W. H. S., one of the attorneys, in trust, and as collateral security on this debt, a bond which B., with one W., held against L. and J. G., for the conveyance of certain lands, amounting to one hundred acres, in which land B. held an interest of one undivided moiety. S. gave a receipt to B., identifying the bond, and stating that he was "to hold the same in trust, until said B. secured by mortgage or otherwise, two notes given by him to G. E. G., dated this day, for three hundred and fifty-five dollars and sixty-one cents, each, payable in four and six months"—which receipt bears date January 2, 1852. Afterwards S. & S. received from C. & S. for collection, certain claims which they held against B., which were settled by the latter giving two notes for four hundred and twelve dollars and seventy-three cents each, and to secure them B. made another assignment of his interest in the same bond, causing the assignment to cover the demands of both G. E. G., and C. & S. Upon this arrangement, on the 24th of January, 1852, S. & S. gave B. a new receipt, reciting the assignment of the bond to S. and the claims held by them in favor of both creditors, to-wit: two notes in favor of G. E. G., and two in favor of C. & S., and stipulating that the condition of the assignment of the bond by B. to S., was "for the purpose of securing the payment of said notes, and no other, and if B. should at any time be able to get the title to said property," the bond was to be delivered up to him, he securing the said notes by mortgage on the property. On the 26th of May, 1852, S. assigned his right and title to the bond to S., his partner, who obtained the legal title to the land. On bill filed by C. & S., against S.—the party holding the legal title to the bond—and G. E. G., the other creditor—praying that the trustee might be decreed to sell the land; and claiming that they were

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entitled to priority of payment, or, at least, to share equally in the fund with G. E. G.: *Held*, 1. That S., to whom the bond was assigned, was properly admitted to testify to the circumstances under which the bond was assigned, and the intention of the attorneys, S. & S., in relation to the rights of the creditors; 2. That such testimony did not contradict the receipt given by S. & S. to B.; 3. That G. E. G. was entitled to priority of payment out of the trust fund.

Appeal from the Mahaska District Court.

THURSDAY, JUNE 17.

IN EQUITY. This is a controversy between creditors for the application to their claims of certain funds of their debtor. The facts are as follows: In January, 1852, the law firm of Seevers & Smith, composed of William H. Seevers, and the defendant, W. T. Smith, received for collection two notes held by the defendant, Garber, against Peter Barnett. The latter being unable to pay at once, assigned to Seevers, in trust, and as collateral security on this debt, a bond which Barnett, with one Wright, held against Louis and John Garrett, for the conveyance of certain lands, amounting to one hundred acres, in which bond said Barnett held an interest of one undivided moiety; upon the assignment of which, Seevers gave a receipt, identifying the bond, and stating that he was "to hold the same in trust, until said Barnett secured by mortgage, or otherwise, two notes given by him, dated this day, to G. C. Garber, for three hundred and fifty-five dollars and sixty-one cents each, payable in four and in six months," which is dated January 2, 1852. Afterwards, the said Seevers & Smith received from the complainants for collection, certain demands which they held against the said Barnett, which were settled by the latter giving two notes for four hundred and twelve dollars and seventy-three cents each, and to secure them he made another assignment of his interest in the same bond, causing the assignment to cover the demands of both Garber and Cox & Shelley. Upon this arrangement, Seevers & Smith gave Barnett a new receipt, on the 24th of January, 1852, re-

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citing the assignment of the bond to Seevers, and the demands held by them, in favor of both the above creditors; namely, two notes in favor of Garber, and two in favor of Cox & Shelley; and stipulating that the condition of the assignment of the bond by Barnett to Seevers, was "for the purpose of securing the payment of said notes, and no other; and if Barnett should, at any time, be able to get the title to said property," the bond was to be delivered up to him, he securing the said notes by mortgage on the property. On the 20th of May, 1852, Seevers assigned his right and title in the bond to the said W. T. Smith.

Cox & Shelley originally brought their bill against Smith alone, praying that he might be decreed to sell the land and pay their debt. Smith, in his answer, disclosed the circumstances, showing the existence of Garber's claim, and setting forth that these creditors conflicted in their claims; each claiming a priority of right in the proceeds of the land. Garber was then made a party defendant. The petitioners claim that if they are not entitled to a priority, they have a right, at least, to come in equally with Garber, and have a *pro rata* distribution of the proceeds. Garber, on the other hand, claims that he is first entitled to the proceeds to the extent of his debt, alleging that it was through him that complainants obtained their information; and after his claim had been secured as above, on the second of January, he informed them of what he had done—upon which they sent their claim to the same attorneys, who arranged it as above mentioned. Smith's answer states, that he understood, throughout the transaction, that Garber was to retain the priority which he originally possessed. A general replication to the answers of Garber and Smith, was filed.

Seevers was called to testify as a witness, and in his deposition says: "I always supposed, until the copy, (exhibit C.), was shown me, (which is the receipt given by Seevers & Smith to Barnett, and the gist of which, regarding the object for which the assignment was made, is given in the statement of the case), that said Garber's claim had

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a preferred lien, on the property described in the bond; and if the said copy is correct, the same is not as I intended it should be. Garber's claim having been first in the hands of Seevers & Smith, and said bond having been assigned to secure the same, I considered it my duty to retain the security I had for its payment, in the same position it was when the claim of Cox & Shelley came into my hands, and so intended it should be, and if it does not bear that relation, then I made a mistake in drawing said exhibit C., and did what I did not intend to do." He states further, that after the demand of Garber had been arranged, as before mentioned, they received those of Cox & Shelley; and, as the best he could do to secure them, made a similar arrangement, taking new notes—retaining the bond as assigned—and giving the receipt heretofore mentioned as given by Seevers & Smith to Garber, called exhibit C. The court rendered a decree, that the trustee sell the land, and, after paying the expenses, that he apply the proceeds to the payment of the two creditors, in proportion to their amounts, and without preference. The complainants appeal.

S. A. Rice and Wm. Loughridge, for the appellants.

W. H. & J. A. Seevers, for the appellees.

WOODWARD, J.—The plaintiffs object to so much of Seevers' testimony as speaks of what he intended to put into exhibit C., (the receipt), when it was written. It may well be doubted whether the testimony goes to contradict the receipt. This does not specify the relative rights of the creditors, nor determine whether they were to receive equal benefit. It only says that the assignment is for the purpose of securing the payment of the notes—meaning those of both parties; and it is not clear that an explanation may not be made, as to their position and rights, or that an agreement or understanding upon that point may

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not be shown. There is no controversy, or question, between Barnett and Seevers & Smith, or either of them.

But the second and principal thought is, that this paper now in question, is only the receipt of Seevers & Smith to Barnett, on obtaining the possession and assignment of the bond, signifying, so far as its own purpose required, and in general terms, the object for which it was given and held. There is no question between them and Barnett. The question is between the two creditors, and this paper was not designed to, nor does it profess to, determine their rights, as between themselves. They are entitled to show their relative positions and rights; and doing this, is not a contradiction of the paper, in this instance—both because that defines nothing of these, and because the instrument is not between them and Barnett. The duty and obligation of Seevers & Smith, under that paper, will be as fully discharged under one mode of distribution as under another, since the whole object of it is, to show that they held the bond as assigned for the payment of the notes, whilst the manner of application—or the proposition of distribution—may consistently exist outside of, and independent of, this receipt between Seevers & Smith and Barnett, it being a matter between the debtor and creditor, and not between the attorneys and the creditor.

We do not intend to say, that these attorneys might not take such a course as to bind their clients; nor that Seevers, upon taking the assignment, might not execute such a declaration of trust as to have this effect. But we do not regard the paper given by Seevers & Smith to Barnett, in this light. It is only in the nature of an attorney's receipt. It is true that all such receipts, specifying to what end the collected funds are to be appropriated, contain a trust, but yet there is a difference between a trust deed, or a declaration of trust, and a mere receipt, and this is of the latter character. It is also to be observed, that the assignment is to Seevers alone, (and from him to Smith), whilst the receipt is by the firm of Seevers & Smith, which latter circumstance is con-

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clusive of its character. For these reasons, it was proper, in our view, that Seevers should testify to the circumstances in which the respective claims were received, and tending to show the rights of the two creditors.

The question remaining to be disposed of is, what are the rights of the two creditors in the funds to arise from the sale of the land. It appears in the case, that Smith had obtained the legal title thereto, and at the September term, 1857, the court decreed that he sell the land; and after paying the expenses, that he apply the proceeds to the payment of the demands of the two creditors, in proportion to their amounts, and without preference.

In this decree, we think, the court erred. It is true that courts will favor an equal, or a *pro rata*, distribution of funds among creditors, but yet they cannot do this at the expense of the parties' agreements, nor of the rights which the law gives to any one of them. It does permit one to secure himself, without reference to others, and in priority to them. And Garber had placed himself in this position. His demand had been first sent to Seevers & Smith, and Seevers had obtained the security of the assignment of the bond. If Cox & Shelly had not actual personal knowledge of Garber's position, they at least had through the attorneys, who were the same that secured Garber's claim; and they have no ground upon which they can drive the latter from his position. His is a prior right, and they have neither right nor equity to oust him from it; nor to come in and stand equal with him. Their claim must be postponed to Garber's, and they must be content to take the residue, after the payment of his debt.

Judgment reversed.

HALL v. MONOHAN.

In an action by the indorser against the indorsee of a promissory note not negotiable, it is not necessary for the plaintiff to show diligence

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against the maker ; and the want of such diligence constitutes no defence to the action.

In such cases, the indorser stands in the relation of a principal, and not surety to his indorsee, and has no right to insist upon a previous demand of the maker, and notice of non-payment.

Appeal from the Polk District Court.

THURSDAY, JUNE 17.

One Pierce made to Monohan the following note :

\$41.91. COON HILL, January 14, 1855.

Due John Monohan, the sum of forty-one dollars and ninety one cents, which I promise to pay in one day."

On the back of this note was the following :

"I sign the within note, for value received, over to Edwin Hall, this second day of February, 1855.

JOHN MONOHAN."

Hall sued Monohan as indorser, averring that he had prosecuted Pierce to insolvency, having instituted suit against him, and recovered judgment on the 12th of April, 1855, and issued execution thereon, which was returned, "no property found," on the 9th of July of the same year. Defendant answered, denying all of the allegations contained in plaintiff's petition. On the trial, all the instructions asked by plaintiff were given, and those asked by defendant refused ; and the giving and refusing of these several instructions, are now assigned for error. Defendant appeals. The instructions are set out in the opinion of the court.

Brown & Ellwood, for the appellant.

J. E. Jewett and *John A. Kasson*, for the appellee.

WRIGHT, C. J.—The principal question raised, and to be determined in this case, will be sufficiently understood,

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by the two following instructions: the first of which was asked by plaintiff and given, and the second, asked by defendant, refused: *First*. "That upon such a note, it is not necessary for the plaintiff to prove diligence (against the maker,) and the want of diligence is no defence to the plaintiff's right to recover." *Second*. "That this note having been assigned after due, and the defendant having been sued as indorser thereon, he cannot be made liable, without proof of demand of maker, and notice to indorser." The case of *Wilson v. Ralph & Van Shaick*, 3 Iowa, 450, determines this. That was an action against the maker and indorser of a promissory note, which (like the note in this case), contained no words of negotiability. It was there held, (following the case of *Seymour v. Van Slick*, 8 Wend., 421,) that the indorsement is equivalent to the making of a new note—it is a guaranty that the note will be paid—it is a direct and positive undertaking on the part of the indorser, to pay the note to the indorsee, and not a conditional one to pay, if the maker does not, upon demand, after due notice. In such case, the indorser is not entitled to the usual privilege of an indorser of negotiable paper. He stands in the relation of a principal, and not surety, to his indorser, and has no right to insist upon a previous demand of the maker, and notice of non-payment. And, see *Smyser v. Hawthorn and Long*, 3 Ib. 266.

Appellant urges that the action is brought against defendant as indorser, and not as the assignor of the note, and that, therefore, the instructions were improper. When we state, however, that this action was commenced before a justice of the peace, the objection, (if entitled to weight or consideration under any circumstances), loses all force. The plaintiff, before the justice, filed the note, and claimed that the defendant was legally liable to him by virtue of the indorsement thereon. No written petition was filed, nor was any necessary. And in accordance with the rule which has been uniformly applied to proceedings before these inferior tribunals, we think the objection is wanting in both technical and substantial weight or force. The

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true question was, and is, whether defendant should be held liable, by virtue of the writing by him signed, on the back of the note, without proof of diligence against the maker, demand and due notice, and it is entirely immaterial whether he is styled the indorser or assignor.

The fact that the note was assigned after due, can in no manner aid defendant.

Judgment affirmed.

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Where an execution plaintiff purchases at sheriff's sale, real estate which, at the time of the sale, was supposed to belong to the defendant, but to which he had no title, and the amount of the bid is credited upon the judgment, the plaintiff may recover back from the defendant the amount of the purchase money.

Where in an agreed case, it appeared that the plaintiffs recovered a judgment against the defendant, for the sum of \$205,76; that an execution was issued on said judgment, and levied on an eighty acre tract of land, supposed to be the property of the defendant; that the land was bid off and purchased by the plaintiffs at the sheriff's sale, for the sum of \$75, which amount was credited on their judgment; that the plaintiffs received a certificate of purchase from the sheriff, but have never received any deed; and that the defendant never had any title to the land; *Held*, That the plaintiff could recover of the defendant the amount bid on the land, and credited on the judgment.

Appeal from the Johnson District Court.

WEDNESDAY, JUNE 17.

This is an agreed case, upon the following statement of facts: Reed & Co., recovered judgment against Crosthwait for \$205,76, on the 28th of April, 1854. An execution was issued, and was levied on an eighty acre tract of land, supposed to be the property of the defendant. The sale was twice adjourned by the sheriff for want of bidders, but on the 13th of June, 1854, the land was bid off

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and purchased by the plaintiffs at \$75, and they received a certificate of the purchase from the sheriff, but have never received a deed. They are ready and willing to deliver up the certificate. At the time of the levy, it was supposed that the land was the property of the defendant, but neither then, nor since, has he had any title thereto.

The plaintiffs claim that they are entitled to recover from the defendant, the said sum of seventy-five dollars, with interest from the 13th of June, 1854, the day of sale. It is agreed, that if the court is of the opinion that the defendant is liable upon the facts, then judgment is to be rendered for said sum in favor of the plaintiffs; but if the court find for the defendant, then judgment is to be rendered in his favor for costs. The district court, at the October term, 1856, rendered judgment for costs in favor of the defendant, and the plaintiffs appeal.

Clarke & Henley, for the appellants, relied upon *McGhee v. Ellis*, 4 Littell, 245, and *Dunn v. Frazier*, 8 Blackf., 432.

Wm. E. Miller, for the appellee, cited Brown's Legal Maxims, 606; 1 Parsons on Cont., 459; 3 Watts, 490; *Freeman v. Caldwell*. 10 Ib., 9.

WOODWARD, J.—From the agreement of the parties, we infer, that if the plaintiff is entitled to recover in any form of proceeding, and whether in law or in equity, judgment is to be rendered accordingly.

It has been held frequently, that a levy upon personal property is a satisfaction of the judgment under which the levy is made. *Ex parte Lawrence*, 4 Cowen, 417; *Reed v. Staats*, 7 Johns., 426; *Hoyt v. Hudson*, 12 Ib., 207; *Wood v. Torrey*, 6 Wend., 562; *Jackson v. Bowen*, 7 Cow., 21; 8 Cow., 192. This appears to have been held when the question arose as to the rights of third parties, and as to the continuance of a lien on land, in favor of the party making the levy on the personalty, and under circumstances

similar to these. But no case has been seen which maintains this doctrine between the plaintiff and defendant; unless in connection with the fact that the levy had not been disposed of. And this doctrine has not, that we are aware, been applied to a levy upon real estate. A material ground of distinction, and that probably upon which the cases proceed, is, that personalty is seized and taken into the possession of the officer, so that, until it is disposed of, it must stand as a satisfaction.

Upon principle, and on grounds of equity, we do not see why the purchaser should not be permitted to recover, where it turns out that the execution defendant was not the owner of the property levied on and sold, whether real or personal. Whatever influence the above doctrine, in relation to a levy upon personalty, may have had in some cases, as that has not been applied to a levy on realty, its influence would cease, and the objections would be reduced to those of a purely technical character, which ought to yield to substantial justice. We do not know that it has been decided, that the purchaser of personal property could not recover, on the property being taken from him, because the defendant was not the owner, even where the purchaser was the plaintiff in the judgment, and we are not called upon to consider that question.

The present is a case of the sale of real property, where the judgment plaintiff was the purchaser. And if we find cases which permit a recovery, we think that just principle will sustain us in following them.

The case of *McGee v. Ellis*, 4 Littell, 244, was upon the sale of a slave, which, it is believed, is held as real estate in Kentucky. It was a bill in chancery, brought by the purchaser, a third person, (from whom the property had been recovered by another stranger,) against the plaintiff and defendant—the creditor and debtor. The court of appeals held, that the purchaser was entitled to recover in equity from the debtor, because the debt being paid by the money of the purchaser, he would, in equity, be entitled to be substituted in the place of the execution creditor, so

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far, at least, as to enable him to maintain a valid demand against the debtor, but he could not recover of the creditor.

Following this, in the case of *Muir v. Craig*, 3 Blackf., 293. On a judgment of Jennings against Craig, Muir bought the land offered for sale. The bill, (in chancery), alleged that Craig had no title, but that this was in the United States. The circuit court dismissed the bill. The supreme court, (Blackford, J., delivering the opinion), refer to the case of *McGhee v. Ellis*, and say: "Our opinion is in accordance with that decision, the principle of which must, we conceive, be applicable to a case of the sale of land. Muir must be entitled to recover in equity from Craig, who has received the benefit, the purchase money paid to the sheriff for the land with interest."

Another case, is *Dunn v. Frazier*, 8 Blackf., 432. Under similar circumstances, Frazier, the purchaser, who was a third person, brought his bill against the judgment plaintiff, or creditor, and the administrators of the debtor. The circuit court rendered a decree against the creditor, which decree was reversed by the supreme court, which held that the creditor was not liable; but that Frazier was entitled to a decree against the debtor. Smith J., in the opinion of the court, says: "The rule *caveat emptor* is generally applied with strictness to purchasers at sales under executions." And citing the case of *Muir v. Craig*, he says: "This was a relaxation of the rule, and it was going as far as we should be warranted in going in the present case."

The only difference between these cases and the one at bar, is, that here the creditor makes the claim; and when the cases, as in *McGhee v. Ellis*, say that the purchaser is entitled, in equity, to be substituted in the place of the creditor, they imply that the latter would, of course, be entitled to recover. And if the equity of the purchaser rests upon the fact, that his money has gone to the defendant's benefit in paying his debt, that of the creditor would be equally strong, resting upon the fact that his

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debt is not paid. Another case is, *Preston v. Harrison*, 9 Ind., 1.

It is our opinion that the petitioner ought to recover. But as the point is not made, we do not determine whether he can recover at law, or whether he must resort to equity.

The judgment of the district court is reversed, and the cause is remanded.

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In replevin, the plaintiff must recover upon the strength of his own right to the present possession of the property. Whatever the right or title under which the defendant may hold the property, if the plaintiff is not entitled to the present possession, he must fail in his action.

No action can be maintained on a contract, the consideration of which is either wicked in itself, or prohibited by law.

A party who has sold intoxicating liquors in this State, with intent to enable another to violate the act for the suppression of intemperance, approved January 22, 1855, cannot sustain an action of replevin against a sheriff, and attaching creditors of the person to whom the liquors were sold, for the recovery of the possession of such liquors, on the ground that the sale was void, and the right to the possession of the liquors still remained in the vendor.

The courts will not assist a party to regain that which he has parted with, for an illegal purpose; and the same principle prevails where it is attempted to recover that which was intended to be sold in violation of law.

Where in an action of replevin, to recover the possession of intoxicating liquors, against a sheriff and the attaching creditors of N., which liquors were sold by the plaintiff to N., with intent to enable him to violate the act for the suppression of intemperance, the court instructed the jury as follows: "That if the jury find that the contract for the sale of the liquors was made in the State of Iowa, to be sold in violation of the law, no right of property ever passed out of plaintiff to N. by reason of such sale; but it remained in plaintiff, and was not subject to the attaching creditors of N.;" and "that if they believed that defendants held through N., as attaching creditors of his, they must find for plaintiff, if they also found that the attachment was made

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while the liquor law was in force:" *Held*, That the instructions were erroneous.

Appeal from the Lee District Court.

FRIDAY, JUNE 18.

The plaintiff sold to one Nutts, a quantity of intoxicating liquors. After the sale and delivery, they were attached, as the property of said Nutts, at the suit of several of his creditors. Plaintiffs then replevied said liquors, making Nutts, the attaching creditors, and the sheriff, parties defendants. On the trial, certain instructions were asked by the plaintiffs and given; others asked by defendants, and refused; and others again given by the court; to the giving and refusing to give all which, the defendants excepted. Verdict and judgment for plaintiffs, and defendants appeal. The instructions will be found in the opinion of the court.

Hornish, Lomax & J. W. Rankin, for the appellants,

C. E. Moss and Wm. Edwards, for the appellees.

WRIGHT, C. J.—Several instructions were asked by plaintiffs and given, embodying substantially the same principle as that contained in the following, which was given by the court in the instructions in chief: "If the jury find that the contract for the sale of the liquors, was made in the State of Iowa, to be sold in violation of the law, no right of property ever passed out of plaintiffs to Nutts, by reason of such sale; but it remained in plaintiffs, and was not subject to the attaching creditors, or Nutts." The jury were also instructed, "that if they believed that defendants held through George Nutts, as attaching creditors of his, they must find for plaintiffs, if they also found that the attachment was made while the liquor law was in force." Without referring to the numer-

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ous other instructions upon this subject, we will state briefly our reasons for holding those above recited to be erroneous.

This is an action of replevin. Plaintiffs must recover upon the strength of their own right to the present possession of the property. Whatever the right or title under which defendants may hold, if plaintiffs are not entitled to the present possession, they must fail in their action.

Again: by the 15th section of the "act for the suppression of intemperance," approved January 22, 1855, [Laws of 1854-5, page 68], it is provided, that, "all sales, transfers, conveyances, mortgages, liens, attachments, pledges and securities of every kind, which either in whole or in part, shall have been made for, or on account of intoxicating liquors, sold in violation of this act, shall be utterly null and void against all persons in all cases; and no rights of any kind shall be acquired thereby, and no action of any kind shall be maintained in any court in this State, for intoxicating liquors, or the value thereof, sold in any other State or country, contrary to the law of said State or country, or with intent to enable any person to violate any provision of this act; nor shall any action be maintained for the recovery or possession of any intoxicating liquors, or the value thereof, except in cases where persons owning or possessing such liquors, with lawful intent, may have been illegally deprived of the same." The liquors were sold to Nutt, the attachments levied, and the property replevied, while this law was in force.

What right then had plaintiffs to the liquors? They insist that they have such right, because their sale was made to enable Nutts to violate the provisions of the law; that it was therefore void, and the right to the possession still remained in them. In the language of Baldwin, J. in *Bartle v. Coleman*, 4 Peters, 184, "to state such a case, is to decide it." The argument assumes that the contract for the sale of the liquors, was illegal, and no principle is better settled, than that no action can be maintained on a contract, the consideration of which is either wicked in

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itself, or prohibited by law. *Armstrong v. Toler*, 11 Wheat. 258; *Hannev v. Eve*, 3 Cranch, 242; *Craig et al v. The State of Missouri*, 4 Pet., 410; *Executors of Cambriosa v. Assignees of Moffit*, 2 Wash., O. C. 98.

But the argument is, that appellees do not seek to enforce a contract, but to recover their property, upon the ground that Nutts obtained it from them upon an illegal contract. To this contract or agreement, however, they were parties. They voluntarily undertook to assist Nutts to violate the law, and for this purpose, sold and delivered to him the property in controversy, to be used for an illegal purpose. The contract thus made, in the language of the law, "was utterly null and void against all persons, in all cases, and no rights of any kind could be acquired thereby, nor any action waived for the recovery or possession of such liquors."

In such cases, the rule is, (in the strong language of the supreme court of the United States, in the case of *Bartle v. Coleman*, before cited), that "the law leaves the parties as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practiced fraud; which, when detected, deprives him of anticipated profits, or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself, by an exertion of its powers, by shifting the loss from the one to the other; or to equalize the benefits or burthens which may have resulted by the violation of every principle of morals and of law." *Dixon v. Olmestead*, 9 Vermt, 310; *Foots v. Emerson*, 10 Ib., 338; *Hall v. Mullen*, 5 Hart, J., 193; *Wheeler v. Russell*, 17 Mass. 258; *Roby v. West*, 4 N. H. 285; *Duncanson v. McLure*, 4 Dall, 308; *Maybin v. Canton*, Ib. 298.

It will be observed that plaintiffs seek to maintain their action, because of the invalidity of the contract of sale to Nutts. The direct and immediate consideration of this contract was illegal, as is clearly assumed in the instructions and in the argument. They sold these

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liquors to Nutts, with the intention, that he, by their sale, should violate a positive statute of the State. For if the consideration was not an illegal one, then, so far as this part of the case is concerned, there would be no pretence that the action could be maintained. Viewing the transaction as an illegal one, therefore, upon what principle is it that they can, by asserting their own turpitude—their own violation of law—seek to recover back their property? Suppose they had paid Nutts a sum of money, if he would take their liquors from time to time, and dispose of them, in violation of the laws of the State, could they recover it back? We think most clearly not. If they had undertaken to pay for such illegal services, Nutts could not recover; but having paid, our courts will not assist them to regain that which they have parted with for an illegal purpose. And the same principle obtains, where, as in the case at bar, it is attempted to recover that which was intended to be sold in violation of the law.

It is entirely immaterial, whether the sheriff could, or could not, sell these liquors, to satisfy the debts of Nutts. If it was so far legitimate property, as to be legally the subject of levy and sale, then plaintiffs would have no more right to it, than to a horse, a wagon, or any other article of personal property, which they might have sold to the attachment debtor. If it was not property in legal contemplation, and could not be sold by the sheriff, neither would it be in the hands of the plaintiffs, nor should the law be invoked to give it into their control. If property, and a legitimate subject of bargain and sale, then it was rightfully in the hands of the officer; if not, then plaintiffs have no right to complain, for “when the parties are equally in the wrong, the condition of the possessor, is the better.”

It is said that it was the duty of the court to leave the property where it found it, and that it could not rightfully make an order in the premises. Grant this, and certainly the plaintiffs would not be benefitted. For, if they

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had no right to bring replevin, then the property, being in the possession of the sheriff, should be left there. It will certainly not be claimed by the argument, that it is true, they have no right to their action, but then they have now, by virtue of their writ, the possession, and the law should leave it there, and the court should make no order in relation to it. Such a position, if sustained, would enable men with impunity to violate the law. Thus, if they found that the person to whom they had sold liquors, was likely to be unable to pay—or that the investment would probably be an unprofitable one—they could at once bring replevin, and say to the court, it is true we sold these liquors in violation of law, and with the design that they should be used for that purpose, but they are not the subject of judicial cognizance, and should be left in our hands, where they are found. Such an argument does not reach far enough back. The law found the liquors in the hands of the officer, and it is there they are to be left, and not in the hands of the party who has, without right, replevied them.

As already stated, it makes no difference whether the sheriff can sell the liquors or not. At present, we have nothing to do with that question. Whether he would be liable, if he should sell them under execution—whether it would be his duty to confiscate them; whether the purchaser could take them, without violating the law, are questions that in no manner change the result of this case. Whatever answers might be given to these inquiries, we are still met with the insurmountable difficulty, that whatever rights others may have—whatever may be their present or future liability—the plaintiffs, at least, stand in no position to maintain this action. They, at least, are not entitled to the present possession of the liquors.

We conclude, therefore, that there was error in the instructions as given by the district court. And thus concluding, it is unnecessary to examine the other errors assigned. It seems that plaintiffs also claimed that the property never passed from their possession, or if it did,

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it was obtained by Nutts through fraud. As to this part of the case, we at present intimate no opinion.

Judgment reversed.

JONES v. SMITH.

Where in an action to recover damages for the fraud and misrepresentation of the defendant, in the sale of a certain parcel of real estate, describing it, the plaintiff attached to his petition a deed from the defendant, conveying two parcels of land to the plaintiff, and the defendant asked the court to instruct the jury as follows: "That there is a material variance between the contract alleged in the petition, and that contained in the deed introduced in evidence, and it is the duty of the jury to render a verdict for the defendant," which instruction the court refused to give: *Held*, That there was no variance between the deed and the allegations of the petition, and that the instruction was properly refused.

And where in such an action, the plaintiff averred that he paid four hundred dollars for the one tract of land, for the fraud in the sale of which he claimed damages, when it appeared from the deed offered in evidence, that that sum was the consideration of both tracts: *Held*, That the sum named in the deed was not conclusive as to the consideration, and that there was no variance.

Where, on the nineteenth of November, 1856, a party was served with notice that on the twenty-fifth of that month, a *dedimus* would be issued to William Cohill, clerk of the district court of Goodhue county, Minnesota Territory, to take the deposition of one K.; and where a deposition was returned, which, from the caption, purported to have been taken on the second of January, 1856, before William Colvill, Jr., clerk of the first judicial court of Minnesota Territory, in and for the county of Goodhue, while the certificate to the deposition shows that it was taken on the second of January, 1857; and where a motion was made to suppress the deposition, on two grounds: 1. It was taken before the suing out of the *dedimus*; and, 2. It was not taken before or by the person named in the notice or commission: *Held*, 1. That it appeared sufficiently that the deposition was taken after the suing out of the *dedimus*; 2. That the second objection was well taken, and that the deposition should have been suppressed.

Jones v. Smith.

Appeal from the Polk District Court.

FRIDAY, JUNE 18.

The plaintiff seeks to recover damages for the fraud and misrepresentations of the defendant, in the sale of a certain parcel of real estate. Verdict and judgment for plaintiff, and defendant appeals. For the material facts, see the opinion of the court.

J. E. Jewett and *John A. Kasson*, for the appellant.

I. The deposition of Knox should have been excluded. *Boyd v. Hastings*, 17 Pick., 200; *Bell v. Morrison*, 1 Peters, 355; Code, section 2449.

II. The instruction asked by defendant touching the variance between the allegations of the petition, setting up the contract, and the deed, should have been given. 1 Zabrisk., 363; *Levy v. Gadsby*, 3 Cranch, 186; *Col. Ins. Co. v. Walsh*, 18 Mo., 231; 1 Greenl. Ev., sec. 64; 2 Ib., 160; *Colt v. Root*, 17 Mass., 235; *Van Kpps v. Harrison*, 5 Hill, 69; *Warren v. Daniels*, 1 Woodb. & M., 90; *Sanford v. Handy*, 23 Wend., 260; *Waldron v. Zollikoffer*, 3 Iowa, 108; *Lawrenson v. Marvin*, 8 Barb., 18; 1 Ad. & Ellis, 40; 24 Wend., 75.

D. O. Finch and *W. J. Gatling*, for the appellee, cited the following authorities: *Mause v. Herkimer Co. Mut. Ins. Co.*, 4 Hill, 187; 3 Bouvier Ins., 214; *Savage v. Smith*, 2 Blackf., 110; 2 Sand., 206; *Ferguson v. Harwood*, 7 Cranch, 408; *Harrison v. Weaver*, 2 Port., 542.

WRIGHT, C. J.—The land sold to plaintiff, is situated in the county of Rock Island, State of Illinois. A copy of the deed bearing, date March 9, 1855, is annexed to the petition and made a part thereof, and two tracts of land are conveyed. Plaintiff complains that he has sustained

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injury on account of the fraud and misrepresentations of the defendant, as to one parcel, and makes no reference in his petition to the other tract. Upon this state of facts, defendant asked the court to instruct the jury, "that there is a material variance between the contract alleged in the petition, and that contained in the deed introduced in evidence, and it is the duty of the jury to render a verdict for the defendant." This instruction, as well as others upon the same subject, and assuming, substantially, similar ground, were refused, and this is the first error to which we direct our attention.

We think the instructions were properly refused. The plaintiff expressly states in his petition, that he claims damages for the fraud in the sale of a tract of land, which is particularly set out, and which agrees, as is admitted, with the description contained in the deed. To his petition he annexes a copy of the deed, which conveys, not only the land set out in the petition, but also another tract. In the sale of this other parcel, he does not claim, or set up, that there was any fraud, or that he has sustained any injury. Defendant thus had full notice of the instrument upon which plaintiff intended to rely for the purpose of showing the sale, and it could make no difference that the same deed conveyed two tracts of land. If the copy annexed, had omitted the description of the second parcel, there might have been some ground for claiming that there was a variance, when the deed itself was introduced in evidence.

It is urged, however, that plaintiff avers that he paid four hundred dollars for the one tract, whereas, the deed shows that this was the consideration paid for both tracts, and that in this there is a variance. The sum named in a deed, is not conclusive as to the consideration; and it seems to us that the most that defendant could claim under the circumstances is, that the jury should take into consideration the fact, that plaintiff received for the four hundred dollars, this second tract of land, as well as the first, and that its value should be allowed him, (defendant), in con-

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sidering the question of damages. But it will not do to say, that the variance is such as to entitle the defendant to a verdict in his favor.

On the nineteenth of November, 1856, defendant was served with notice, that on the 25th of that month, a *dedimus* would be issued from the office of the proper clerk, to be directed to "William Cohill, clerk of the district court of Goodhue county, Minnesota Territory," to take the deposition of one Knox. A deposition was returned, which, from the caption, appears to have been taken on the 2d of January, 1856, before "William Colvill, Jr., clerk of the first judicial court of Minnesota Territory, in and for the county of Goodhue." The certificate attached to the deposition shows, that it was taken on the 2d of January, 1857. A motion was made to suppress this deposition—*first*, because it was taken before the suing out of the *dedimus*; and, *second*, because it was not taken before or by the person named in the notice or commission. This motion was overruled, and this is the second error relied on to reverse this cause.

We entertain no doubt as to the first cause assigned for suppressing the deposition. Taking the whole record together, it is very manifest that the date given in the caption of the deposition, is a mere clerical mistake—one that might, from the date, easily occur. The certificate, however, removes all doubt, and shows that it was taken after the suing out of the *dedimus*. Under the circumstances, we think the mistake of date in the caption unimportant, and that no substantial prejudice can result to defendant by disregarding it. If so, then the deposition should not, for this cause, be excluded. Code, section, 2461.

The second objection presents a question of more doubt. The Code provides that the party wishing to take a deposition, may select as a commissioner, the clerk, or any judge of any court of record, who may be appointed by his name of office; "but the name of the court of which such person is clerk or judge, must be stated in the com-

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mission. Sections 2448, 9. And then, by section 2461, it is provided that important deviations from any of the directions contained in the foregoing sections, shall not cause the deposition to be excluded, where no substantial prejudice could be wrought to the opposite party by such deviation. In this case, the impress of the seal of the commissioner is not before us, and we are thus left to determine the office of the commissioner from the title which he gives to himself, in taking the deposition, and the return which he makes to the commission. And we think it very clear, that he is the clerk of a court having a different name and style from that used in the notice and *dedimus*. In the one, he is styled "the clerk of the district court;" in the other, he says he is "clerk of the first judicial court of Minnesota Territory." We incline to the opinion that this deviation is important, and should have excluded the deposition. The Code, in requiring the name of the court of which the commissioner is clerk to be stated in the commission, we think, must have intended that the officer named, and not another, should take the deposition.

It is provided in the same sections, that the parties may agree upon, or the court may appoint, any individual, whether an officer or not, for the purpose of taking the deposition. In such cases the parties, or the court, select the individual because of the confidence they may have in him, that he will faithfully and honestly perform the trust. And yet, it would scarcely be contended that C. D. could perform the duties, under a commission appointing A. B. So, in that class of cases where an officer, by his name of office, is selected, it seems to us, there is as little reason for claiming that some other officer may perform the duties. As well might it be claimed, that if the judge of a court is appointed, the clerk, a notary public, or a commissioner of deeds, could take his place, and transact the business.

We are not inclined to exclude depositions, except upon substantial grounds. We must remember, however, that while unimportant deviations are to be disregarded, the

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authority to take testimony in this manner, is in derogation of the rules of the common law; and there should, therefore, be some measure of strictness in the construction of the statute. And where there is a clear departure from the authority given—when the deposition is taken and returned by an officer not named in the commission, and not known to the record—we think it would be overlooking a substantial and important deviation, to permit the deposition to be read. *Breyfogle v. Breckley*, 16 S. & R., 264; *Daggett v. Tallman*, 8 Conn., 168; *Bell v. Moursor et al.*, 1 Peters, 351.

It is suggested that the officer named in the commission and return, is the same, though called by a different name. Of this we cannot take judicial notice, and no fact is brought to our attention in this record, to sustain the position. Apparently they are as different as though one was the clerk of the district, and the other of the supreme court. The names would indicate that the jurisdiction of the courts of which they are clerks, are entirely distinct and separate. *Plummer v. Roads*, 4 Iowa, 587.

Several objections were urged in the court below, to parts of the deposition of one Stoddard, taken on the part plaintiff, which were overruled; and this ruling is now assigned for error. The objections are, for the most part, to matters of form, and without referring to them in detail, we will merely say that we think they are not well taken. The safer and better rule is, to require that the objections to the form of the interrogatories, shall be made before the commission issues. *Keeny v. Chiles*, 4 G. Greene, 416. And where the objection is, that testimony is irrelevant, it depends so much upon the other evidence offered, and the actual attitude of the case in the court below, at the time of the trial, that we should require a very clear case of irrelevancy, indeed, before we could hold that the testimony was improper.

Exceptions were taken to the instructions asked by plaintiff, and given; to the refusing to give those asked by defendant; and to the action of the court and officers, after

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the jury had retired ; but as their disposition is not necessary to the determination of the case at present, we do not feel called upon to notice them. We have examined and disposed of those questions only, which will certainly avail, on a second trial, and thus leave the case.

Judgment reversed.

BUTCHER v. BRAND.

When the statute fixes the terms of the district court, a defendant is bound to take notice of the time when such court sits.

It is not essential that an original notice should specify the time when the term of the district court will commence.

A defendant upon whom an original notice is served, requiring him to appear and answer "on or before the second day of the next term" of the district court, has a right to assume the term next after the service, to be the "next" term mentioned in the notice.

Where a petition commenced as follows: "Your petitioner claims of," &c., "one hundred and eighty dollars, which he alleges to be due him from the defendant, and for cause of such claim," and after describing two notes in one count, concluded as follows: "Which said promissory notes are still the property of your petitioner, and that the amount above claimed is still due thereon. He therefore asks judgment for that amount, with interest and costs;" which petition was filed January 5, 1857, and service had at same time; and where the court rendered judgment against defendant for the sum of \$187,90, at the September term, 1857, with interest thereon at ten per centum per annum; *Held*, 1. That the plaintiff could take judgment for the sum claimed, with interest from the commencement of the action, under the clause in the petition praying judgment for the sum claimed, with interest; 2. That the court erred in rendering judgment for ten per cent. interest per annum.

Under a prayer in a petition, asking judgment for the amount claimed, with interest, the plaintiff may take judgment for the sum claimed, with interest on *that* sum from the commencement of the suit. If he would take judgment for more, he must increase his *ad damnum*.

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Appeal from the Marion District Court.

SATURDAY, JUNE 19.

Action upon two promissory notes, one for \$120, dated December 11, 1854, and the other for \$60, dated January 1, 1855, and both payable to the order of the plaintiff, two years after date. The petition was filed January 5, 1857, and claimed of the defendant, one hundred and eighty dollars, which is alleged to be due to the plaintiff, and asks judgment for that amount, with interest and costs. The original notice required the defendant to appear and answer on or before the second day of the next term of the Marion district court, or that judgment would be rendered against him by default. The return on the notice shows, that it was received by the sheriff on the 5th day of January, 1857, and was served on defendant on the 2d day of January, 1857. At the September term, 1857, of the Marion district court, judgment by default was rendered against the defendant, for the sum of \$187.90, with interest thereon at the rate of ten per centum per annum, and costs. The defendant appeals. The errors assigned are stated in the opinion of the court.

Jarius E. Neal, for the appellant.

James Mathews, for the appellee.

WOODWARD, J.—The first assignment of error is, that judgment was rendered by default against the defendant, when the original notice required him to appear and answer at the next term, without stating on what day the term commenced, or on what day he was to answer. The notice summons the defendant to appear and answer “on or before the second day of the next term,” but is not dated. The sheriff, however, certifies upon the notice, on what day it came into his hands, and on what day it was

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served. These days were January 2d and 5th, 1857. This makes the notice sufficiently certain. It has no existence to any legal effect, until it reaches the officer's hands. That is the commencement of the action, (Code, section 1663), and the defendant has a right to assume the term next after the service, to be the "next" term mentioned in the notice. The terms of court are usually fixed by statute, and where this is so, as it was in Marion county, the defendant is to take notice of them. It is not essential that the notice should define the time of the sitting, although it is the better practice. There was no error in this.

The second assignment is, to the rendering judgment against defendant by default. No ground of error is perceived in this, since the notice was served personally, and more than the time required by law, before the term.

The error thirdly alleged, is the rendering judgment in favor of plaintiff, for a larger amount than he claimed in his petition and original notice. The petition commences thus: "Your petitioner claims of, &c., one hundred and eighty dollars, which he alleges to be due him from the defendant, and for cause of such claim"—(and then sets out two notes in the one count, and concludes), "which said promissory notes are still the property of your petitioner, and that the amount above claimed is still due thereon. He therefore asks judgment for that amount, with interest and costs." Judgment is rendered for \$187.90, "with interest thereon at the rate of ten per cent per annum," &c.

It has been held by this court, that this form of petition, and this manner of claiming damages, is sufficient to give the plaintiff the amount first demanded, and interest on that from the commencement of the action. Thus, in the present case, the plaintiff can recover the \$180.00 first claimed, and also the interest on that sum, from the time of bringing suit till judgment, under the concluding words in the declaration, praying "judgment for that amount, with interest." But the plaintiff cannot go back, and re-

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cover a balance of interest due on the notes. He should lay his *ad damnum* large enough to cover all such probable recoveries. The reasoning on the matter, is the same that it was under the former mode of pleading the *ad damnum*, but the mode of statement, or claim, is slightly changed. There is no error upon this point, since the judgment is for the \$180.00 first claimed, with interest on that, at six per cent from the bringing suit to the rendition thereof. There may be a slight error, arising, probably, from computing interest, but if any, it is such as to fall within the maxim, *de minimis non curat lex*.

The error remaining, is upon rendering the judgment so as to draw interest at ten per cent. In this there is error. There is nothing to warrant it. The notes draw no interest until due, and then only the six per cent. implied by law. The judgment is reversed, and the cause remanded, with directions to the district court, to correct the judgment in accordance with this opinion.

Judgment reversed.

 COURTNEY v. CARR.

Before the actual return of a writ of attachment, it is the duty of the officer to serve it; and though the defendant may have had no property when the writ was first placed in the hands of the officer, and though the officer may have endorsed that fact upon the writ, yet if the defendant subsequently, and before the return of the writ, acquires property, or if further search discovers property belonging to him, it is proper for the officer to attach it.

An indorsement by a sheriff upon a writ of attachment, that there is no property of the defendant within his county, does not preclude his successor, to whom the writ has been delivered, from levying the attachment upon property of the defendant, nor render his acts irregular.

A mortgagee of real estate possesses no interest or title in the lands mortgaged, that can be attached.

Where an action is commenced by attachment against a non-resident, who is a mortgagee of real estate situated in the State, a levy of the attachment upon the lands so mortgaged to the defendant, will not give the district court of the county in which the lands lie, jurisdiction of the cause.

Courtney v. Carr.

An action against a non-resident defendant, to recover damages for the alleged fraud of the defendant, in the sale of real estate, situated in Boone county, commenced by attachment in the Boone county district court. The plaintiff had received a warranty deed of the premises, and executed to the defendant a mortgage to secure the payment of a portion of the purchase money. Two writs of attachment were issued—one directed to the sheriff of Boone county, and the other to the sheriff of Polk. The writ directed to the sheriff of Boone county was returned served, by attaching the land conveyed to the plaintiff, and on which the defendant held a mortgage. The writ directed to the sheriff of Polk, was served by attaching certain real estate of defendant, situate in that county. There was no service of any kind on the defendant. At the return term, the defendant appeared specially, and moved that the venue in said cause be changed to Polk county, which motion was overruled; *Held*, That the district court of Boone county had no jurisdiction of the cause; and that the court erred in overruling the motion.

Appeal from the Boone District Court.

SATURDAY, JUNE 19.

This action was brought to recover ten thousand dollars for the alleged fraud of the defendant, in the sale of certain lands, with a steam mill situated thereon, in Boone county. Plaintiff having made affidavit that defendant was a non-resident of the State, two writs of attachment were issued—one directed to the sheriff of Boone, and the other to the sheriff of Polk county. The writ directed to Polk county, was returned served, by attaching certain lots in Des Moines, taken as the property of said defendant, on the twenty-second of April, 1857. The one directed to the sheriff of Boone, was returned August 17, 1857, and is endorsed as follows:

“This writ came into my hands, April 27, 1857. There is no property of the within named Horace Carr in my county. May 25, 1857.

C. W. WILLIAMS, Sheriff of Boone Co., Iowa.

“This writ came into my hands, July 15, 1857.

S. J. BURTON.”

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“I received this writ, August 14th, 1857.

W. H. HOLMES, Sheriff.”

“I attached the [*the return here gives a description of certain lands*], according to deed record of Boone county, Iowa.

WILLIAM HOLMES,
Sheriff of Boone Co., Iowa.

The land described in the return by the sheriff of Boone county, is the same as that sold by defendant to plaintiff, for which he executed a warranty deed, and upon which, to secure the balance of the purchase money, the plaintiff executed to defendant a mortgage. At the October term, 1857, the defendant not having been served with notice of the pendency of the action, he made a special appearance, and moved that the venue in said cause be changed to Polk county, which motion was overruled and the cause continued. He now appeals.

M. D. & W. H. McHenry, for the appellant.

Finch & Crocker, and *A. Y. Hull*, for the appellee.

WRIGHT, C. J.—Under the Code, the general rule is, that personal actions must be brought in the county whercin some of the defendants actually reside. If, however, none of them have a residence within this State, they may be sued in any county, wherein either of them may be found. Section 1761. In this case, the defendant was a non-resident; he was not served, or found, in any county; and we must, therefore, refer to other provisions, if any there are, to determine where the suit should have been brought.

In cases of attachment of property, where the defendant is not served, or where the suit relates to real property, it may be brought in any county where the real property, or any portion of it, lies, or where any part of the personal

property may be found. Section 1703. As already stated, the defendant was not served, and the question now is whether the district court of Boone county, under the circumstances disclosed, had jurisdiction of the case, or whether the venue should have been changed, on his motion, to Polk county. It is quite manifest that property of the defendant was attached, by the sheriff of Polk county, and it is equally clear, that by virtue of that attachment, the district court of that county, would have had jurisdiction to hear and determine the cause. If, however, any portion of defendant's real property lying in Boone county, was also attached, then the district court of that county, also had jurisdiction, and the motion to change the venue was properly overruled. And thus we see, that the question is narrowed down to this: had the defendant such an interest in the land, set out in the sheriff's return, as could be attached in the method attempted, so as to authorize the court to take cognizance of the cause? In coming to this question, one or two positions, assumed by appellant, though not material to the disposition of the cause, may still properly receive attention. And first, it is assumed that after the first sheriff, (Williams); made his return, it was irregular and incompetent for the second sheriff, to do any thing with the writ. This might be true, if it appeared that the writ had been returned to the clerk, or into court. But this is not shown. On the contrary, it appears that the writ was not returned until after the second service by Holmes. The facts were doubtless these, that Williams made his return, and handed the writ to his successor, Holmes, who made the service in the manner stated. And it is not true that, because the defendant may have had no property within the county, at the time the writ was placed in the hands of the sheriff, or at the time the first return was made, there was therefore no jurisdiction, if property was afterwards found and attached. As well might it be assumed, that the court had no jurisdiction, because the defendant was not found by Williams, though Holmes

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should afterwards have served him personally. Before the actual return of the writ, we think it was the duty of the officer to serve it; and though the defendant may have had no property at one time, yet if he had subsequently, and before the return of the writ, acquired property, or if further search developed property belonging to him, it was proper to attach it, and thus the court would get jurisdiction.

It is also claimed that the return of Holmes, does not state that the property attached was that of defendant, and that it is only where it affirmatively and clearly appears by the officer's return, that the defendant had an interest in such property, that the jurisdiction attaches. In this case, however, the bill of exceptions and the record, show that the property mentioned in the return, was the same as that sold and conveyed by defendant to plaintiff, and by plaintiff mortgaged to defendant, to secure the unpaid purchase money. It being shown and conceded, therefore, that defendant had by his warranty deed, parted with his title to the land, and all interest therein, and that his only claim thereto was by virtue of his mortgage, the question is, whether this interest, or claim, could be thus attached, so as to authorize the Boone district court to take jurisdiction of the cause, or whether it should have been transferred to Polk county, upon defendant's motion?

And this question, we think, must be answered in the negative. This action is transitory, and not local. It might be brought against the defendant in any county in the State, in which he might reside. Not being found there, the law says it may be brought, in cases of attachment, in any county where his property, or any portion of it, lies, or may be found. For this provision, there is a reason, else why not let it be brought in any county, without regard to the location or existence of the property. The answer is, that the judgment was to affect the thing—the property—and not the person, and the location of the property was made the test or criterion of jurisdiction.

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But the reason and policy of the law would be defeated, if jurisdiction could be conferred by attaching that which was not subject to attachment, and which could not be made liable, after judgment, to the plaintiff's demand. Thus, if it appeared that the writ was served upon property, belonging to another, and in which the defendant had no interest, legal or equitable, it would be absurd to say, that by such unavailing and useless levy, the court obtained jurisdiction. So, if the levy is made upon property, or upon a claim or interest, which is not subject to attachment, and which could not be sold, it would be equally absurd, and equally contrary to the spirit and object of the law, to say that such levy conferred jurisdiction.

What interest then, let us inquire, had the defendant in this land, which could be the subject of attachment, or of levy and sale under execution? Will it be pretended that the interest of a mortgagee in lands, can be levied upon and sold, or that it can be attached and held? We clearly think not. Suppose it was sold, what interest or right would the purchaser acquire by his purchase? Could he proceed to foreclose the mortgage, upon a breach of its conditions? Could he, by virtue of his purchase, compel the mortgagee to transfer to him the debt or demand secured by the mortgage? Or, in this case, where the mortgagor proceeds to attach the land as the property of the mortgagee, what is his position? Suppose he should proceed to sell the land, under his judgment, could he plead such purchase, or aver the extinguishment of the mortgagee's lien, in bar of any suit brought on the notes, or a proceeding to foreclose the mortgage? To these inquiries, it seems to us, there can be but one answer. The unpaid purchase money was the principal object—the substance of the contract between the parties, to this mortgage—and the mortgage was a mere incident to the substantial thing. It was given to secure the payment of the money, and though cancelled or given up, the ordinary remedy to recover upon the notes, would not thereby be

taken away. The plaintiff—the mortgagor—had the legal title to the land, and had the right to the possession of the same, (section 1210); and he could not, by attaching and selling it as the property of the defendant,—the mortgagee,—divest the mortgage lien, nor take any additional title or interest himself, under such proceedings. Nor could a third person, by thus purchasing, acquire any title or interest, which would interfere with, or render less perfect and complete, the right of the mortgagee to assert and enforce his lien. While the right of the mortgagor in the premises, might be subject to attachment, execution, and sale, it by no means follows, that the lien of the mortgagee, would be subject to legal process. And we are not aware that it has been held in any state, that such lien, as an interest or right in the land, was subject to attachment, until, at least, there was, as is practiced in some states, an entry to foreclose. *Williams on Mortg.*, 427; *Glass v. Ellison*, 9 N. H. 69; *Kelly v. Burnham*, *Ib.*, 20; *Hunter v. Hunter*, Walker 194.

We have said that, as an interest or right in the land, this lien of the mortgagee could not be attached, so as to give jurisdiction to the district court of Boone county. But perhaps it is said that any property of the defendant, not exempt from execution, may be attached; and that the word property, includes lands, tenements, and hereditaments, and all rights thereto, and interests therein, equitable as well as legal; as, also, money, goods, chattels, evidences of debt, and things in action. [This is true. Code, section 26. But to attach money, or debts due to the defendant, the proceeding must be by garnishment, and not by attaching the real estate upon which the defendant may have a lien to secure his money or debt. Section 1860. And a party plaintiff cannot, by taking an improper process, or by procuring a useless service, give jurisdiction, even though he might accomplish it by the proper process, or by another and appropriate proceeding. A third person, therefore, by instituting the proper proceedings, might, by garnishment, attach and hold any

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debt owing from plaintiff to defendant. The plaintiff, however, could not in his own action, garnishee himself, and his remedy would not be by attachment, to reach the debt owing by him to the defendant, but by a proceeding in equity to restrain its collection, until his claim for damages could be adjudicated and ascertained. Whether the circumstances are such as to justify the interposition of chancery, of course, we do not undertake now to determine. We only say, that he cannot, by attaching the land for which he has a warrantee deed, so reach the lien of the mortgagee thereon, as to give the court jurisdiction.

The order refusing the change of venue is, therefore, reversed.

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Chapter 251 of the Laws of 1857, entitled "An act providing for appeals in criminal cases," does not confer the right to appeal from an order to punish for a contempt.

6	245
126	340
126	351

The mode of revision in cases of contempt is by *certiorari*, under section 1606 of the Code.

Chapter 251 of the Laws of 1857, providing for appeals in criminal cases, refers to those cases in the same sense, and in the same manner, in which they are referred to in chapter 184 of the Code, and only changes the manner of bringing such cases to the appellate court.

To constitute a contempt, under the first specification of section 1598 of the Code, the act or behavior complained of, must have taken place in the actual or constructive presence of the court.

To render a party guilty of a contempt, under the first specification of section 1598 of the Code, the contemptuous or insolent behavior must be *towards the court*—the court must be engaged in the *discharge* of a judicial duty—and the behavior must tend to impair the respect due to its authority.

The contemptuous and insolent behavior need not be in the court room, and under the eye of the court, in order to amount to a contempt.

Where by a general rule, or by a special rule made as to some case on trial, the publication of the testimony pending an investigation, has been prohibited, a wilful violation of such rule, may amount to a contempt, upon the ground that it would be a resistance to the order thus made; and especially so, if the rule itself declared such an act a contempt.

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The provisions of the Code upon the subject of contempts, are a limitation upon the power of the court to punish for any other contempts. The publication of articles in a newspaper, reflecting upon the conduct of a judge, in relation to causes pending in his court, and which were disposed of before the publication, or the publication of the evidence and the arguments of counsel in a case undisposed of, in which there was no rule of court prohibiting such publication, however unjust and libellous the publications may be, do not amount to contemptuous or violent behavior towards the court, under chapter 94 of the Code; nor are they so calculated to impede, embarrass, or obstruct the court in the administration of the law, as to justify the summary punishment of the offender under that chapter.

Certiorari to the Des Moines District Court.

SATURDAY, JUNE 19.

The plaintiff in error is the editor and proprietor of "The Daily Hawkeye," a newspaper published in the city of Burlington, in this State. In November, 1857, one Abrahams was tried and convicted of a criminal offence, before the Hon. Thomas W. Claggett, judge of the first judicial district, and then holding court in said city. Of this trial and conviction, the said Dunham published the following article in his said paper:

"In the malicious prosecution pending against J. F. Abrahams, under the rulings of the court, he was convicted of leasing his house for improper purposes, and fined by Judge Claggett, \$100. Upon his appearing and offering to appeal to the supreme court, Judge Claggett fixed the bail at *fifty thousand dollars*. What do our readers think of the fairness and impartiality of a judge who is guilty of this extortionary demand, in direct violation of the eighth amendment to the constitution—'excessive bail shall not be required.' In the light of this oppressive demand, it is easy to see what an engine of injustice and outrage our courts of justice are capable of being made, in the hands of a vindictive and implacable man, such as we hope Judge Claggett will not prove himself, or corrupt and

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infamous men, such as Lecompte and Cato, of Kansas. We do not believe our records have ever before been disgraced by, or our archives contained, such a bail bond, as that demanded by Claggett, and given yesterday by J. F. Abrahams. Fifty thousand dollars bail, in a case wherein the sentence of the court was a fine of one hundred dollars! Has the case a parallel?"

Upon the sworn relation of the said judge, a writ was issued and served upon said Dunham, commanding him to appear before said district court, and show cause why he should not be punished for a contempt, for and on account of said publication. In obedience to the writ, he appeared and answered; admitting that he was the editor and proprietor of said paper, and that the said article was published therein, by the direction and authority of the respondent. He further answered that said case of the State v. Abrahams had, at the time of the publication, been fully adjudicated in the district court, and taken by appeal to the supreme court; that his object and purpose was to condemn the action of the court, in requiring Abrahams to give fifty thousand dollars bail; and that in doing so, he intended no disrespect to the court. He also says he had a right to publish the facts and comments, as they appear in said article; denies that he is amenable to the court in this summary method, for said publication, and further denies the right or power of the court to thus call upon him to answer, or that said publication amounts to a contempt.

A hearing was had as to this charge, but before its determination, the respondent, in the same paper, published the following articles:

"THE FIRST ATTEMPT IN IOWA TO MUZZLE THE PRESS.—Waiting no longer for the decision of the court, we shall to-morrow publish a correct, and so far as we can make it, full and complete report of the arrest and trial of C. Dunham, in violation of his constitutional rights, and his priv-

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ileges of trial by jury, for daring to speak of the doings of Judge Claggett and the circuit court. We shall give a full account of this high-handed assault upon the liberty of the press, by a vindictive and august judge, with the speeches of counsel, Hon. J. C. Hall, and Hon. H. W. Starr, response of court, &c., &c. Extra copies of the "Hawkeye," can be had at this office and at the news depots."

"THE DIFFERENCE.—The other day, upon a bare surmise that it would be prosecuted, under the law, and according to law, for what it had published, the "Gazette" blubbered and snivelled, and appealed to the sympathy of this community.

"At the mere will and pleasure of an august and arbitrary judge, in violation of his constitutional rights, the editor of this paper was arrested and carried before Judge Claggett, for daring to express his opinion of the doings of the circuit court, in a case already adjudicated. We have neither cried over it, nor called for public sympathy. Yet the most intense interest has been felt in this community, and democrats, republicans—men of all parties—have not only expressed their sympathy, but their determination to see the liberty of speech and the press vindicated, and the petty tyrant who disgraces the judiciary of Iowa, shorn of the power he is now abusing."

"We hear that Mr. M. D. Browning, one of the oldest and most distinguished lawyers in the State, has declared his unwillingness to appear in any case before Judge Claggett. He retires from the practice of the law before the circuit court, until the impeachment, or resignation, of Claggett!"

"ANOTHER NICE CASE.—A case was before the circuit court last week, which has had but few parallels. It was a suit for seduction on the part of a Swede woman, and a widow, aged forty-seven, against a man named Boke.

Upon oath, she declared that the seduction occurred three weeks after the death of her husband, upon a promise of marriage on the part of Boke. It hardly seems possible that a jury of twelve men, on their oaths, could find a man guilty upon such a showing; yet, upon the pointed charge of the court, the jurors did bring in a verdict of guilty, and the woman and her friends were thus aided in their scheme of extortion. Boke, having no chance for fair play before Claggett, resolved to carry his case before another tribunal. He appealed to the supreme court. But the court resolving, as it has in every instance, to hold the issues in its own hands, put up the bail bond at three thousand dollars, believing that sum beyond the reach of the defendant. But the oppression of the court defeated its own ends. Under the feeling of outrage and injustice, gentlemen came forward and went upon the appeal bond, who would not have signed a two hundred dollar, or any other bond for him, under any other circumstances. There is a spirit abroad in this community, which says, as plainly as anything can be said, that no man shall use his position and power as a judge, to gratify his own private pique and malice, and to oppress and outrage those who incur his displeasure."

These articles were published on the 10th of November, and on the 11th there was published in the same paper, a very full account of the hearing on the first charge, and including what the respondent represents to be, the substance of the argument of counsel and the remarks of the court. The said article also contains the comments of the respondent, referring to the manner in which the prosecution originated, and referring in strong terms of condemnation, to Judge Claggett, and in disparagement of his integrity as well as ability. This article is very lengthy, and is not embodied in this statement, for the reason that the language used in it is substantially the same, so far as it relates to the judge or the court, as that contained in the articles above set out. Other parts of it, so far as ma-

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terial, will be found referred to in the opinion of the court.

A second information was filed by Judge Claggett, charging the respondent with being guilty of contempt, in publishing these articles in his paper in the 10th and 11th of November. He was accordingly arrested, and in relation thereto, he, on the 13th of the month, published the following article :

“ **MORE CONTEMPT.**—Yesterday afternoon, we were again cited to appear forthwith before Judge Claggett, and show cause why we should not be punished for a second contempt of court, the first case not having yet been disposed of. It is certainly a refinement upon the legal technicality, for Judge Claggett to charge us with attempting to influence his decision, in our own case, by reproducing in print, the arguments which were made before him, and his rejoinder. And he *swears* that in that publication, our object was to influence his high mightiness. And it certainly is a legal fiction to say, that there was any cause pending. There never was a cause. Judge Claggett constituted himself judge and jury, and would have added the character of executioner, if he had dared. His attempted censorship of the press, as it appeared in our forcible arrest and trial, never had a color of law, and was not a cause pending in any fair sense of the word. It was an outrage—it was a mockery—it was anything, rather than a cause pending in any legal and proper sense. We had the same right to publish it, as we should have had in publishing an account of our forcible abduction, when we might escape from our lawless captors. It is Judge Claggett's second effort to deprive us of our rights, and prevent his arbitrary and tyrannical acts from becoming known through the medium of the press.”

For publishing this article, the respondent was charged the third time with contempt, upon the information of the prosecuting attorney of Des Moines county. Being arrested, he appeared and answered the second and third

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charges—admitting the publications, and setting up the same matters as in his answer to the first charge. He also says that what he published, he believes to be true; that he is not aware of any rule of said court, prohibiting the proprietors of newspapers from publishing the proceedings, acts and judgments of said court, either pending their trial, or after their determination; that said publication had no connection with the court; that he is not guilty of any contemptuous or insolent behavior towards the court, while in the discharge of any judicial duty; and that, in all that he has done, he has kept remote from the court; and he insists that he is liable, if liable at all, not in this summary method, but only according to the course of the law.

The respondent was discharged under the first charge; found guilty under the second and third, and fined fifty dollars; and to reverse this conviction, he prosecutes this suit.

J. C. Hall and *C. Ben Darwin*, for the plaintiff in error, cited the following authorities: 4 Black. Com., 279; 7 Cranch, 34; *Anderson v. Dunn*, 6 Wheat., 204; 3 Cushman, 440; 4 Cranch, 94; 1 Blackf., 166; *Ex parte Hickman*, 4 Smedes & M., 751; *Skiff v. The State*, 2 Iowa, 550; 2 Vesey, 520; 2 Curtis, 447; 1 Caines, 518; 1 Dallas, 319; *Stuart v. The People*, 3 Scam., 395; 4 Black. Com., 32; 2 Atkins, 82; Wallace C. C., 76; 7 Cranch, 447; Wright (Ohio), 78.

Samuel A. Rice, (Atty. General), for the State.

I. The power to punish for a contempt is one that is inherent in every court, and is necessary for its preservation. The legislature has no power, either by an affirmative or negative statute, to take away or abridge this power; and any attempt upon their part so to do, would be an infringement upon the constitutional rights of an equal and co-ordinate branch of the government, and would be unconstitutional and void.

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II. The causes of contempt set forth in the Code, are merely an affirmance of the common law, as far as they go, and cannot be held to take away the right of the court to punish for other acts or proceedings, which tend to impair the respect due to its authority.

III. A newspaper publication concerning a matter pending in court, and which goes to impair the respect due to its authority, or to bring it into ridicule, is a contempt of court, and can be punished accordingly. As fully sustaining the foregoing views, the following authorities are referred to: 4 Blackstone, 279, 285, 32; 6 Wheaton, 204; 4 Cranch, 94; 1 Blackf., 166; 4 Smedes & Marsh, 751; 2 Iowa, 69, 550; 7 Cranch, 447; Kent Com., 328; Wright (Ohio), 421; 8 Scam., 404; J. Williams R., 679; 2 Vesey, 520; 1 Dallas, 819; Wallace Cir. Co., 76; 2 Atkins, 82; Dunlap's Fed. Com. Law, 54.

WRIGHT, C. J.—This case was first brought to this court by appeal. A motion was made to dismiss, for the reason that *certiorari*, and not appeal, was the proper process. This motion was sustained for the reasons following: Under the Code, the only mode of reviewing a judgment or order in a criminal action, is by a writ of error, as prescribed in chapter 184. By chapter 251 of the Laws of 1857, 412, the right to appeal is given in all criminal cases where judgment may be rendered in any of the district courts of the State, by complying with the provisions of said chapter. The 1606 section of the Code, provides that "no appeal lies to an order to punish for a contempt, but the proceedings may, in proper cases, be taken to a higher court for revision, by *certiorari*." In our opinion, chapter 251 of the Laws of 1857, does not give the right to appeal from an order to punish for a contempt. The mode of revision, in such cases, remains the same as it did before the passage of the late law. This last law refers to criminal cases in the same sense, and the same manner, in which they are referred to by the Code, and only changes the method of bringing such cases to this court. *The First*

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Cong. Church v. City of Muscatine, 2 Iowa, 69. The appeal was, for these reasons, dismissed.

The case is now before us, however, by *certiorari*, and we proceed to examine it upon its merits. From its novelty in this State, and the character of the questions involved, this case has occupied no little space in the public mind. The record of facts is somewhat voluminous, and present various acts on the part of the respondent, which are claimed to be contempts, and punishable by the district court. And yet, notwithstanding its public importance, and the repeated publications charged to have been made by the respondent, and admitted by him; and while the case belongs to that class of cases which it is always unpleasant to adjudicate, we are of the opinion that the consideration and application of a few general principles, will be sufficient for its disposition.

‘In the examination, we have endeavored to keep constantly in view, what is due from the citizen to the authority and power of the courts of the State. And on the other hand, as was our duty, we have had regard to the liberty of the individual, and the proper freedom of the public press. As the power to punish for contempt, is a necessary one—necessary to the very existence of judicial tribunals, and their efficiency and own preservation—and while it is a power that is not only inherent in every court, but one that is abundantly recognized by the constitution and laws of the several States; so, on the other hand, the personal liberty of the individual—and the liberty of speech and the press—are made no less secure, and are upheld by considerations equally important, and essential to the prosperity and advancement of every free government. In consonance with these rights, our own constitution declares, that no law shall be framed to restrain or abridge the liberty of speech or the press, and that every person may publish his sentiments on all subjects, being responsible for the abuse of that right. It is also declared that the right of the people to be secure in their persons, shall not be violated; that the right of trial by jury, shall

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remain inviolate; and that no person shall be deprived of life, liberty, or property, without due process of law. The liberty of the press, however, should never be confounded with its licentiousness, nor should a fear of its licentiousness, justify the abridgement of its proper and necessary liberty.

The power given to the courts to punish for contempts, is not alone for their own preservation, but also for the safety and benefit of the public. The life, liberty and property of every citizen, are protected, and the true welfare of society ensured and promoted, in the preservation of this power in its proper vigor and efficiency. Take from our courts this power—deprive them of this trust—and they would be subject to the clamorous demands of an excited mob—to disturbances calculated to interrupt the due course of judicial proceedings. Every order and process made or issued, might be illegally resisted, with comparative impunity; and at no very distant day, they would cease to command the respect of the public, or be able to secure obedience to their mandates. This respect and this obedience, they must command and secure, however, upon the principle that the power to punish for contempt, is a preservative power, and should not be used for vindictive purposes. It is a power delicate in its character. Necessity alone, should justify a resort to it. It must be used and applied by the soundest discretion. “Respect to courts cannot be compelled. It is the voluntary tribute of the public, to worth, virtue and intelligence, and while they are found on the judgment seat, so long and no longer, will they retain the public confidence.” *Stewart v. The People*, 3 Scam., 395.

Our Code declares that certain acts or omissions therein named, are contempts, and are punishable as such, by the courts of the State, or any judicial officer acting in the discharge of an official duty. The acts charged in this case, if punishable under the Code, must be so by virtue of the first clause of section 1598, as being “contemptuous or insolent behavior toward the court, while engaged in the discharge of a judicial duty, which may tend to impair

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the respect due to its authority." In this view, however, we cannot concur. We think this clause has reference to some act or behaviour in the actual or constructive presence of the court. The use of the words, "behavior towards"—"while engaged"—and "in the discharge of"—would clearly seem to show that this was intended. Not, it is true, that the contemptuous and insolent behavior, need be in the court room, and under the eye of the court, in order to amount to a contempt. But, the court being in the discharge of its judicial duties, the guilty party, though not in its immediate presence, might do those things which would amount to a contempt. Thus, if the respondent had procured, to be posted within the court room, pictures or articles, calculated to obstruct, embarrass or impede the administration of justice, or impair the respect due to the authority of the court, either by caricaturing the judge, or otherwise, the act might well be said to be done in the presence of the court, it would be "behavior towards said court." So, also, a person outside of the court room, but within hearing, might make use of such language, or do those things, which would render him liable for contempt, as fully as though spoken or done within the bar. But to make a party guilty under this clause, the contempt, or insolent behavior must be towards the court—the court must be engaged in the discharge of a judicial duty—and this behavior must tend to impair the respect due to its authority. It would be a perversion of the entire language used, and a palpable violation of the spirit and policy of the provision, to say that a judge could bring before him every editor, publisher, or citizen, who might, in his office—in his house—in the streets—away from the court, by printing, writing, or speaking, comment upon his decisions, or question his integrity or capacity. The law never designed this. It is not thus that an independent and intelligent court, will be apt to secure public confidence. Such a power is not necessary, for either the protection of the court or the public.

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If by general rule, or by special rule made as to some case on trial, the publication of the testimony pending the investigation, had been prohibited, a willful violation of such rule, might amount to a contempt, upon the ground that it would be a resistance to the order thus made; and especially so, if the rule itself declared such an act a contempt. Such rules are not unfrequently made, and are often calculated to prevent improper impressions being made upon jurors, to the injury of the parties litigating. No such rule is pretended to have been made by the court below. If, therefore, the respondent did nothing more than comment, though never so severely, upon the action of the court; and though he may have published ever so fully, and, whether truly or falsely, the proceedings upon the first hearing, we cannot think it would amount to a contempt, under the first clause of the section under consideration. We, of course, know nothing of the accuracy of the account published of said hearing. Nor, or the purposes of this inquiry, is it material that we should. Nor are we to be understood as sanctioning the propriety of the course pursued by respondent, in his comments and references to the proceedings of the court. If his attack were libellous, then it seems to us, that he and the judge assailed, should be placed on the same grounds, and "their common arbiter, should be a jury of the country." No court can or should hope, that its opinions and actions can escape discussion or criticism. When a case is disposed of, and the decision announced, such decision becomes public property, so to speak. The construction given to a statute—the reasoning and conclusion of the court upon the facts—all go to the public, and become subject to public scrutiny and investigation. In such cases, it is perfectly competent and lawful, for any one to comment upon the decision, and expose its errors and inconsistencies. If such comments do not correct errors, they will, at least, lead to renewed caution and circumspection upon the part

of those whose duty it is to declare the law. It would be a fruitless undertaking, in this country—where the freedom of speech and the press is so fully recognized, and so highly prized—to attempt to prevent judicial opinions from being as open to comment and discussion, as an opinion or treatise upon any other subject. It is well, and fortunate that it is so. This right is fully recognized in England, and it would be strange, if, under our institutions, we should be less tolerant.

To investigate and discuss the opinion of the court, and to disobey its mandates or orders, are quite different things. All men may rightfully make their comments, but none should disobey, except upon pain of suffering the penalty attached for the violation. And should those thus commenting, leave the subject, and impute dishonesty or base motives to the judge, he may be punished by indictment, for a libel—he may be answerable in damages in a civil action—or he may be liable to both prosecutions.

As to the acts of the respondent, it will be observed, that, except in relation to his comments, and the publication made of the proceedings in his own case, on the first hearing, his articles had reference entirely to cases that were not before the court. The cases of Abrahams and Boke had been adjudicated, and appealed to this court. As already stated, there was no rule, general or special, prohibiting the publication of the speeches of counsel, remarks of the court, or giving a statement of the proceedings on the first investigation. And, without referring to the effect of making the publication, if there had been such rule, it is sufficient to say, that it could not, under the circumstances of this case, amount to a contempt.

It is insisted, however, that the courts of this State may punish other acts and omissions as contempts, than those mentioned in the Code. We are strongly inclined to think, however, that the provisions of the Code upon this subject, must be regarded as a limitation upon the power of the courts, to punish for any other contempts. We can conceive of no possible state of case, in which the exercise of

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this power might become necessary for the protection of the court, or the due administration of the law, that is not covered by these provisions. If such a case should, by possibility arise, we would not say that, by virtue of its inherent power, the punishment might not be inflicted. It is sufficient to say, however, that this is not one of those cases. The newspaper articles of the respondent, may have been never so unjust—his strictures and censures have been never so malignant and libellous—and yet, in our opinion, they, in no proper legal sense, under the circumstances, amounted to contemptuous or insolent behavior towards the court, nor were they so calculated to impede, embarrass or obstruct the court in the administration of the law, as to justify the respondent's punishment in this summary method.

Judgment reversed.

FERRIER v. BUZICK *et al.*

In equity, where the allegations of the petition are not denied, they are to be taken as true.

The purchaser of property actually in litigation, though for a valuable consideration, and though he may have had no express or implied notice, in point of fact, is affected in the same manner as if he had such notice.

The party relying upon a pending action, as notice to a purchaser *pendente lite*, must show that he has been constant and continued in its prosecution.

Appeal from the Polk District Court.

FRIDAY, JUNE 19.

SPECIFIC PERFORMANCE. In September, 1854, complainant filed his bill against Buzick, the obligor in the bond, praying a conveyance, and asking an injunction to restrain

6	258
106	77

6	258
1110	596
1110	597

6	258
135	630

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the said defendant from selling the said property. This injunction was served on the 26th day of September, and in December of the same year, Buzick was served with notice of the pendency of said action. On the same day that the bill was filed, Buzick conveyed to his co-defendants, Scotts, which deed was not delivered until in May, 1855, and recorded June 28d, 1855. In that action, the equities were found in favor of complainant, and defendant appealed to this court. At the December term, 1855, said decree was reversed, the bill ordered to be dismissed without prejudice, and complainant had leave to proceed *de novo*.

This bill was filed June 13, 1856, the said Buzick and Scotts being made parties. The Scotts are charged with notice of petitioner's rights, and also of the outstanding bond from Buzick to Bostick—by Bostick assigned to Almond—and by Almond to petitioner. The answer of the Scotts denies all notice, and all knowledge of such outstanding bond. The cause was heard on bill, answer, replication, exhibits, and depositions, and a decree entered requiring the defendants to convey as prayed by the bill, and they now appeal.

J. E. Jewett and J. A. Kasson, for the appellant.

W. W. Williamson, for the appellee.

WRIGHT, C. J.—It is first objected that the proof is insufficient to show, that complainant is the holder of the bond given by Buzick to Bostick, or that he has such an interest in the property, as entitles him to a conveyance. No question is made as to the validity of the bond, nor as to the sufficiency of the assignment from Almond to complainant, but the objection goes to the assignment from Bostick to Almond. A sufficient and conclusive answer to this position, is, that the defendants nowhere in their answer, pretend to deny that complainant is the holder of the bond, nor his averment in his bill that it had been regularly assigned, and that he is now entitled to all the

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rights which accrued to the obligor named in the bond. Buzick admits the making of the bond; that he had conveyed the premises to Scotts; and avers that he had tendered to the complainant the consideration money, with interest. The Scotts admit their purchase from Buzick; deny all notice of any outstanding equity in complainant, or other persons, and aver that they purchased in good faith. And thus we see, that the issues made by the answer in no manner questioned the fact stated in the bill, that complainant was the holder of the bond, by proper and sufficient transfers; but the defence is put upon other and distinct grounds.

Indeed, as to the defendant, Buzick, there is virtually no defence interposed, but the main, and we may say, the only substantial question in the case is, whether the Scotts were purchasers with notice. If they were, then complainant is entitled to a decree against them, as well as Buzick. If not, then under the prayer of the bill, and the pleadings, he is clearly entitled to a decree against Buzick for his damages. So that, as we view the case, complainant is entitled to relief; but whether he shall have the property, or compensation for the loss of it, is the real matter in issue.

The purchaser of property actually in litigation, *pendente lite*, though for a valuable consideration, and though he may have had no express or implied notice, in point of fact, is affected in the same manner as if he had such notice. This rule, though it may, in some cases, operate with hardship upon a purchaser, is one of general convenience, and is now well and firmly established. *Murray and another v. Ballou and another*, 1 Johns. Ch. 565; *Ray v. Roe*, 2 Blackf., 258; Story's Eq. Jur., sec. 405.

In this case, the property purchased by the Scotts, was actually in litigation between complainant and Buzick; it was the immediate object of an action which was pending; and unless there is some circumstance to take it out of the rule, it is clearly one of those cases, where the purchaser is bound by constructive notice of the matter in-

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volved in such suit. It is claimed, however, that when the deed was made to the Scotts, there is nothing to show that an action was pending. The deed was executed on the same day that the first bill was filed, but which was prior in time, does not appear. The deed was not delivered, however, until long afterwards, to-wit: in May, 1855, as shown by the deposition of one of the Scotts, and as averred in the bill. At that time, the case of this complainant against Buzick, was still pending and undetermined. Whether the deed was delivered before or after the determination of the cause in the district court, does not appear, nor is it material. If before, it was an action pending for this property; if after, then, as there was a decree in favor of complainant, the position of the Scotts would be no better. If delivered after appeal to this court, they were bound thereby, for the property was still actually in litigation.

It is said, however, that the decree in this court was in favor of Buzick; that the Scotts then had their deed; and that the subsequent commencement of this action, could not have the effect of making them purchasers with notice. In other words, the position is, that when the first suit was terminated, that instant their title, as against complainant, was perfect, and that he must be turned over to his remedy against their co-defendant, Buzick. Previous to their purchase, the Scotts had no interest in this property, either legal or equitable. It is very evident that they purchased at the time that this litigation was either actually, or about to be commenced, and that they received their deed while the first action was pending, of which it was their duty to take notice. Under such circumstances, we are very clear that the subsequent action of this court, in dismissing the bill without prejudice, with leave to proceed *de novo*, cannot make valid their deed as against complainant. It is true, that in order to be notice to the purchaser, the action must have been duly prosecuted—by which, we understand is meant, that the party relying on the pending action as notice, must show that he has been constant and continuous

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in its prosecution. In this instance, the action first commenced, was determined in this court, in April, 1856, (being as of the December term, 1855), the bill dismissed without prejudice, and leave given the complainant to proceed *de novo*. This he did at once, by filing the present bill. If the Scotts had purchased between the time of the termination of the first, and the commencement of this action, it might well be doubted whether they would not be purchasers with notice. Purchasing, and taking their deed at the time they did, we have no hesitation in saying, that they occupy no better position than they would, if the first decree had been affirmed in this court. Without quoting from the cases to sustain this position, we may cite the following: *Debell v. Foxworthy*, 9 B. Mon., 228; *Clay v. Marshall*, 4 Dana, 95; 11 Ves., 200; 1 Cases in Ch. 150.

But whatever doubt there might be as to this point in the case, we are satisfied that Scotts had actual notice of the claim set up by complainant to the property in controversy. It is proved by the sheriff who served the writ of injunction, that Buzick admitted that he had evaded him, and that he searched for him diligently on the day the writ was issued—being the day of the date of the deed to Scotts. It is charged in the bill, and not denied by the answer, that this deed was made at one o'clock at night. The deed was retained by Buzick for about nine months, and then for the first time delivered to Scotts. It is charged that the first suit was pending at the time the deed was made and received, and this is not denied. Under all these circumstances, (and there is no testimony on the part of the defendants), we are satisfied that the Scotts contrived with Buzick, to prevent complainant from obtaining his deed, and that they acted with actual notice of his equitable right to the property.

Decree affirmed.

The State of Iowa v. Guyer.

THE STATE OF IOWA v. GUYER.

Where in a criminal case, a wife is introduced as a witness in favor of her husband, under section 2391 of the Code, it is error for the court to instruct the jury, that "her testimony, at all events, should be received with great caution."

In such cases, the testimony of the wife is to be received, and her credibility tested, by the same rules which apply to all other witnesses.

Appeal from the Lee District Court.

SATURDAY, JUNE 20.

INDICTMENT FOR LARCENY. The prisoner was tried, convicted and sentenced to the penitentiary for five years, and now prosecutes this appeal. For the facts, see the opinion of the court.

F. Semple, for the appellant.

S. A. Rice, Att'y General, for the State.

WRIGHT, C. J.—The wife of the prisoner was introduced by him as a witness, and in relation to her testimony, the court instructed the jury as follows: "Although the law permits the wife to testify for her husband, in a criminal prosecution, yet the jury are not bound to believe her testimony; if they see proper to disregard it, they have the right so to do. Her testimony, at all events, should be received *with great caution*. And if, under suspicious circumstances, and against established facts by other competent testimony, they ought to give it but little weight, or wholly disregard it." To this instruction, the defendant excepted.

The testimony of the wife was competent, under section 2391 of the Code, which provides that, "the husband can in no case, be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by the one against the other; but they

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may, in all criminal prosecutions, be witnesses for each other."

We think this instruction would be correct, but for the use of the words, that "*her testimony, at all events, should be received with great caution.*" As shown, the law makes her a competent witness. Her credibility, however, is to be judged by the jury. We do not think, however, that she is necessarily to be treated as a witness testifying under suspicious circumstances; nor that the jury should, because of her relation to the prisoner, receive her testimony with great caution. As to all witnesses, the jury are to judge of their credibility; and this they do, by reference to their intelligence, consistency and means of information. If the witness is related to the party for whom he testifies, this fact is also to be taken into consideration, and due weight should be given to the feeling and bias which may naturally be supposed to exist, as the result of such relationship. All of these circumstances, as well as others—as, for instance, the appearance and manner of the witness upon the stand—his manifestations of feeling or interest in the result of the cause—are proper for the consideration of the jury; and with this duty there should be no interference. But while this is true—and while the jury may not be bound to believe a witness, and may disregard his testimony—they are not to disbelieve or disregard testimony captiously, without cause, at their own uncontrolled and unreasonable discretion. In such matters, a wide latitude is wisely given them; but they have no right to disregard the testimony of a witness who stands in every respect unimpeached, and who shows that he has the means of information, and speaks intelligently and consistently. This much we have deemed it proper to say, at this time, to explain what is meant when it is said, that the jury have the right to disbelieve a witness, or entirely disregard his testimony.

As to the testimony of the wife, we think the proper view of her credibility is this: She is to be received, and her credibility to be tested, by the same rules which apply to all other witnesses. The father is a competent witness

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for the son—the son for the father—the brother for the brother; but the fact that they are related may, properly, be considered by the jury, in giving weight to their testimony. So, the wife is made competent in criminal cases for the husband, but her feelings and bias in favor of her husband, and her natural anxiety that he shall be acquitted, may most appropriately be considered, in judging of her credibility. But to say that, in the first instance, her testimony is to be received with *great caution*—without regard to her manner upon the stand, the consistency of her story, or its agreement with other testimony from other witnesses—we think, is to brand her with suspicion in advance, to an extent not contemplated nor warranted by the law. The jury should weigh well and carefully the testimony given by her, as well as all other witnesses, and give to it such force or influence as, in their reasonable opinion, it should have, under all the circumstances. But if, to start with, they are—whatever her manner, or however consistent her story—to be upon their guard, and exercise *great caution*, in receiving her testimony, instead of judging of its credibility by the same rules which govern them as to all other witnesses, it must be readily seen that this provision of the Code—this change of the common law rule—would have but little practical effect.

We conclude, therefore, that this portion of the instruction was calculated to produce a wrong impression, and to weaken the testimony of the witness, to an extent which would be unfair and unjust to the rights of the prisoner. And for this cause, without passing upon the other errors assigned, the judgment is reversed, and a trial *de novo* awarded.

RING v. THE COUNTY OF JOHNSON.

In an action against a county on interest coupons attached to county bonds, issued in payment of subscription to the capital stock of a rail-

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way corporation, it is not necessary to set out in the petition the power of the county to make the contract.

Under section 108 of the Code, a promissory note issued by a county, need not be executed by a county judge in his official capacity, and acknowledged by him, nor have the county seal affixed.

Section 108 of the Code does not apply to parol or implied contracts entered into by a county; and the words "contracts to be formally executed," in that section, indicate a distinction among written contracts.

Where interest coupons attached to county bonds, were signed, "By order of the Judge of the County Court of the county of Johnson, State of Iowa. S. J. Hess, Clerk of the County of Johnson," and to which no county seal was attached: *Held*, That the seal of the county was not essential to the validity of the instrument, and that the instrument was so executed as to bind the county.

Where interest coupons issued by a county, recognize the fact, that they constitute part of, and belong to, certain bonds, and recite that they are given for the interest becoming due upon such bonds, it is to be presumed that the bonds were correctly executed by the county judge, and are under the county seal.

An action may be maintained against a county, upon interest coupons issued by it, without setting out in the petition the bonds to which the coupons were originally attached.

Appeal from the Johnson District Court.

TUESDAY, JUNE 22.

This action was brought to recover the amount of one hundred notes or coupons, each for the sum of thirty-five dollars, and which are in the following form:

INTEREST WARRANT No. 1, OF BOND No 1.

The county of Johnson, in the State of Iowa, will pay to the holder hereof, at &c., on the first day of June, 1856, thirty-five dollars, for interest due on that day, on bond No. 1, issued for subscription to the stock of the Lyons Iowa Central Railroad Company. By order of the Judge of the County Court of the county of Johnson, State of Iowa.

\$35.

S. J. HESS,
Clerk of the County of Johnson.

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These coupons are alike, except in the time when payable, and the numbers. The declaration alleges, that "on the first of December, 1853, the county of Johnson made and delivered their promissory note in writing, whereby said county of Johnson undertook and promised, for value received, to pay," &c. The defendant demurred, upon the following grounds: 1. That the petition does not show that the defendant had the power or authority to make, or execute the said promises to pay; nor does it set forth any facts which show such power and authority; 2. That the defendant had no power or authority under the laws of the State, to make the same; 3. That the said promises are void upon their face, for the reason that the county had no such power; 4. That the petition does not show that said promises to pay, were under the seal of the county, or were executed by the defendant; 5. That the petition sets forth no sufficient cause of action against the defendant. The demurrer was overruled. The defendant rested upon it, and judgment was rendered for the plaintiff, from which the defendant appeals.

Clarke & Henley, and Levi Robinson, for the appellant.

James Grant and Wm. E. Leffingwell, for the appellee.

WOODWARD, J.*—Both the notes declared on, and the declaration, state upon their face, that they were given and issued upon the subscription of the county, to the stock of the Lyons Iowa Central Railroad Company. The first three causes of demurrer constitute, substantially, but one, which is, that the petition does not set forth, or show, any power in the county to enter into such contracts; and that, in fact, it had not such power—or, two propositions, at the most, will embrace them; one being, that the county had not the power; and the other, that, admitting the exist-

WRIGHT, C. J., dissenting.

ence of the power in law, yet it should be set forth and shown. They will be considered together in the brief space which they require.

The question whether counties have power, under the law of this State, to subscribe to the stock of railway companies, and thus to assist in the construction of this species of road, has been fully considered by this court in the case of *Clapp v. The County of Cedar*, 5 Iowa, 15. This question is not argued in the case at bar, and the counsel do not appear to look for a re-examination of it. Since the decision of the former cause, the court has seen no occasion for a change in its views, and the subject will not be again discussed in the present case.

As the power of the county to make such a contract, exists by virtue of the general law of the land, we do not perceive any reason why it should be set forth in the declaration, more than in any other supposable instance. Why is it thought requisite in the present instance? The fact that, in a case of this kind, there must first be a vote of the people to authorize it, does not constitute a reason for such a change in the manner of declaring. The law giving the power to make the contract, and to give the note, in a certain state of things, and the note having been given, the pleader may assume the needful circumstances, until the contrary is pleaded. Why would it not be equally necessary to set forth the power of a county to execute any other contract, by setting forth its considerations, since its power is limited to a small number of subjects, and goes no farther than the statute defines? Without further discussion, we may say that we perceive no reason why the plaintiff should be held to set forth the power of the county in the first instance.

The fourth cause of demurrer is, that the petition does not show that the notes were made under the seal of the county, nor that they were executed by it; and the fifth cause is, that the petition sets forth no sufficient cause of action. The objections here suggested are, that the instruments sued on, and annexed, are not under the seal of the

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county, and do not purport to be signed by the authorized agent of the county—that is, the county judge. The question here is, first, whether the note must be under the seal of the county; and whether it is obligatory on the county, when signed in the manner in which this is.

It has become the well established doctrine, that corporations of all kinds may be bound by contracts not under their seals. Angell on Corporations, 287. And they may be bound, not only by verbal and implied contracts, but by those which are in writing, and not having the seal; and by these, too, when made by their agents. Angell, 234 to 237, &c.; Kent, 290 to 292, 336 to 339, eighth ed.; Story on Con., sec. 312, and note, fourth ed., 1856.

Then the only questions are, whether the Code, by section 108, deprives counties of this facility of action, or this power, and renders it necessary for them to make all their contracts—at least all written ones—under their seals; and whether those in the present case appear to be made by the agent of the county. These questions demand a construction of the above section, as to whether it requires the county seal and the judge's signature, in all cases of written contracts, or whether its intent is limited to one class of instruments, leaving others open to the law, as we find it on these subjects in our day, and as indicated in the foregoing remarks. We do not think the statute intended to forbid that relaxation of the ancient rule concerning the action of corporations, which has been brought about by experience and dictated by necessity—which has been found absolutely necessary in the increase of the number of corporations, and their multiplied and diversified application to the business of life. We are unwilling to believe it intended to ignore all modern improvements and advancement in the application of the law to the transactions of men, and to carry us back to the ancient, inflexible and impracticable rules relating to corporations and their mode of action. Therefore, applying these thoughts to the present state of things, if the county judge makes a contract for building a court house, or to put a fence around the pub-

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lic grounds, it does not seem to be of necessity that the county seal should be affixed to it. And if he purchases material, as lumber, brick or stone, and gives the note of the county, it would not appear essential that the seal should be attached. In such cases the law, whether statute or common, does not require a seal; and why should this corporation be thus restricted, not only beyond individuals, but beyond other corporations. Looking at the above section, (108) however, as the law which must govern, the question to be decided is, is it intended to cover all contracts, or only those of a certain class. The above thoughts cannot determine the point, but they may assist us in arriving at the intention of the legislature.

It would seem that each and all of the requisitions of the section apply to whatever class, or classes, of contracts are intended to be embraced in it—that is, whatever contracts are meant, they must be in the name of the county, executed by the judge, acknowledged by him, and sealed with the county seal. For, upon what rule can it be said, that one of these requisites applies to one instrument, and not to another; or that one of them belongs to one case, and another of them to another. It is manifest, that the provision can apply to written contracts only. And if the words, “which are to be formally executed,” cover *all* these, then are they all to be signed by the judge, acknowledged by him, and have the seal affixed. This construction would restrict and embarrass the action of the county, to a very great degree. It would throw it back to the old rule, which was universally found so inconvenient, that a struggle has been going on for the past century to liberate them from it. It would be shutting out this class of corporations, from the benefit of those improvements in the law relating to them, which judges and courts have been striving to effect, and which has been accomplished for all others. Considerations of this kind are entirely legitimate, in the attempt to find the design of the legislature, and they do not lead the mind to the impression, that

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the intention was to restrict the counties to so narrow and rigid a rule.

But we must look to the language of the section. And we are drawn at once to the words, "to be formally executed." What was intended by these? The first and prominent impression on the mind, upon reading the section is, that it aims to provide for some particular class of instruments. If all written contracts were meant, it certainly would have been more simple and more clear, as well as more natural, to say "all written contracts" made by the county, shall be executed as follows. If this is the sense intended, it is most unhappily expressed—there would seem to be a studied effort to avoid clearness.

The words "to be formally executed," could not have been used to distinguish written from unwritten contracts, but they manifestly indicate some distinction between those which are written. It may be asked, what is there, beside deeds of conveyance, to which the words "other contracts to be formally executed," can apply, unless they include all which are to be signed by one or both of the parties. We may answer, that they would naturally, and well, apply to all that class of leases which the law formerly said should be under seal, &c., and which our statute now says shall be acknowledged and recorded—to title bonds, and all instruments creating an interest in, or affecting real estate—perhaps, to contracts coming within the statute of frauds, and to sales of personal property, where the possession is not changed. These instances, we say, may be intended by those words, because these the law *requires* to be in writing, and generally requires an acknowledgment and recording also, for some purpose, and in which the common law requires a seal. But it is not our design to undertake a definition of all the instances, which the words under examination are intended to embrace. We only aim to show, that there may be a meaning for them, without extending them to all written instruments. They cannot apply to parol and implied contracts, and therefore they must indicate some line of distinction among written ones, and the

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above remarks indicate a possible and reasonable distinction. Upon the whole, we are of the opinion that the following propositions are correct: *First*, The section under review, (108) of course, does not apply to parol or implied contracts; *secondly*, The term "contracts to be formally executed," indicate a distinction among written contracts; and *thirdly*, The promissory note of the county, is not embraced in the meaning of these terms. Therefore, we conclude, that the seal of the county is not essential to the validity of the instruments now sued upon.

We come, then, to the question, whether these instruments are signed or executed in such a manner as to bind the county. It is urged that the county judge is the sole agent—the only known agent of a county—and that none other can act as such, or can bind the county. In the case of *Clapp v. The County of Cedar, ut supra*, we have expressed the idea that, although the statute constitutes the county judge the "general agent" of the county, yet the law of principal and agent, and the common ideas of an agency, do not apply to him, nor to the relation existing between him and the county; because he is an officer created by the law, his powers and duties are defined by the law, and not by the county, and he is answerable to the law; and although the people of a county elect the person who shall act, yet they do not create the office, nor define his powers and duties, and they cannot refuse to elect, nor can they dismiss him. So that he is the living representative—the embodiment of the county. His acts are the acts of the corporation. When an act is of a nature to be performed by another, he can appoint an agent. Many of his powers he could not delegate to another, such as his judicial authority, and such would be his official judgment and discretion. But no objection is perceived to another's performing a ministerial act, under his order and direction. Of this character, is the act of the clerk in signing the notes, by order of the county judge. The clerk could not determine whether the stock should be taken, nor whether the bond and coupons should be given; but the objections

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to his signing these instruments, upon the order of the judge, is not very apparent. It is equivalent to the order of the county, and the clerk acts as under the county authority, and it must be considered sufficient.

There is ground for a doubt, whether what has been said, could be maintained in relation to the coupons alone, and if they stood separate and independent from the bonds of the county. *Clark v. City of Janesville*, 4 Am. L. Reg., 591. But they themselves recognize the fact, that they constitute part of, and belong to, certain bonds; that is, the existence of such obligations is recognized in them, and they recite that they are given for the interest becoming due upon them. As those obligations are not set out in the action, but are referred to, and assumed in the coupons, it is presumed that they are correctly executed by the county judge, and are under the county seal. There is nothing further made to appear in relation to them, than the recital in the notes; and as some presumption must be entertained in regard to them, it would naturally and necessarily be in their favor, rather than against them. Whatever doubt, therefore, might exist in regard to the coupons, in case they stood alone, it is obviated by the reference in them to the obligations of the county on which they rest. In view of the whole matter, we conclude that the action may be sustained upon these instruments. If the defendant questions the fact of the authority of the clerk from the judge, to execute them, this should be done by a denial, and it does not arise under a demurrer.

No importance is attached to the circumstance, that the clerk recites that he signs, by order of the "Judge of the County Court," instead of the "Judge of the County of Johnson," or "the County Judge;" nor that he styles himself "Clerk of the County of Johnson." Although the statute does not formally give the clerk such a name of office, but says that the clerk of the district court shall be *ex officio* clerk of the county court, yet it sometimes styles him "the County Clerk," as in sections 255, 274, 313. And as to the style given the judge, as his offices require so

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nice a discrimination, whether he is acting in the one capacity or in the other, and as he is legally styled "County Judge," or "Judge of the County of Johnson," we should hardly consider it a fatal error, that he is entitled "Judge of the County Court."

We conclude that the instruments sued on are sufficient to hold the county, so far as regards any matter suggested on the demurrer, and the judgment is affirmed.

Judgment affirmed.

WRIGHT, C. J., *dissenting*.—As I hold that the county had no power to issue these bonds, for reasons stated in *Clapp v. The County of Cedar*, I dissent from the foregoing opinion. I think the demurrer should have been sustained.

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After an executor or administrator has appeared before the county court, in proceedings to prove up a claim against the estate, and consented to a continuance, and the appointment of an auditor to audit the claim of the plaintiff, he cannot, on appeal to the district court, move to dismiss the suit for want of notice, as required by law.

Where on appeal from the county court, in proceedings to prove up a claim against an estate, the transcript shows that the executor or administrator, made an appearance, the defendant in the district court cannot be permitted to show, by affidavit, that he did not appear, and thus contradict the record of the county court.

Upon the failure of an appellant to docket his case, and prosecute his appeal, in proceedings to prove up a claim against an estate, the district court may affirm the judgment of the court below, or may dismiss the appeal, leaving the judgment of the court below to stand.

In proceedings against an administrator or executor, to prove up a claim against an estate, no judgment—in the sense in which the term is ordinarily used—should be rendered.

The object of the proceeding is to ascertain the truth and justice of the claim made against the estate; and when so ascertained, it is to be allowed, and ordered to be paid from the assets of the estate.

In proceedings to prove up a claim against an estate, the executor or administrator, and not the estate, should be made party defendant. No

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judgment or adjudication can be rendered against the estate as defendant, as against a natural person.

Where a judgment is rendered against an executor or administrator, it should be against him in his official capacity, to be levied of the goods and chattels of the deceased, in his hands to be administered.

In proceedings against an executor or administrator, to prove up a claim against an estate, no order should be entered for the issuing of an execution.

Where in proceedings against an executor, to prove up a claim against an estate, appealed to the district court, the said court, on motion of the appellee, affirmed the judgment of the court below, for the reason that the appellant had failed to prosecute the appeal, and rendered judgment as follows: "That the said plaintiffs recover of Martha E. Eubank, late Martha E. Carey, executrix of the estate of S. T. Carey, deceased, the sum of two thousand and fifty-six dollars and ninety-five cents, and that execution issue on the judgment"; *Held*, That the judgment was erroneous.

Appeal from the Pottawatomie District Court.

TUESDAY, JUNE 22.

The county court of Pottawatomie county rendered a judgment in favor of the plaintiffs, against "the estate of S. T. Carey, deceased," as defendant, for the sum of \$1,954.35. From this judgment, Martha E. Eubank, the executrix of Carey, appealed to the district court. In the district court, the executrix moved the court to dismiss the suit, for the reason that no notice of the hearing had been served on her, as required by law. In support of this motion, the affidavit of D. W. Price was filed, to show that no notice had been given to the executrix, and that no appearance had been made for her at the hearing, nor any want of notice waived. This motion was overruled; and thereupon, the plaintiffs moved the court to affirm the judgment of the county court, for the reason that the defendant had neglected to prosecute her appeal, and had not paid the fees for docketing the cause in the district court. This motion was sustained; the judgment of the county court was affirmed, and it was adjudged that the said plaintiffs recover of Martha E. Eubank, late Martha E.

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Carey, executrix of the estate of S. T. Carey, deceased, the sum of \$2056,95, and that execution issue on the judgment. From this judgment, the executrix appeals.

Frank Strest and Clarke & Henley, for the appellant.

A. V. Larimer, for the appellees.

STOCKTON, J.—The motion by defendant to dismiss the suit, was correctly overruled. Although the record does not show that the county court acquired jurisdiction of the cause, in the manner prescribed by law, yet it appears by the entry of the county judge, that “the parties appeared,” and the hearing was continued until the regular term in August. At the August term, the transcript states that, “by request of parties,” an auditor was appointed to audit the plaintiffs’ claim, and report to the court. At the November term, the auditor having reported that the estate of S. T. Carey was indebted to the plaintiffs in the sum of \$1954,35, judgment was rendered accordingly. The executrix might have objected in the county court, that the claim of the plaintiff had not been stated, sworn to and filed, as required by law. She might have objected, that ten days notice of the hearing, indorsed upon a copy of the claim, had not been served upon her, in the manner required for the commencement of actions in the district court. Code, section 1359. But after having appeared, without making these objections at the earliest opportunity; and after having consented to a continuance of the cause, and to the appointment of an auditor, she cannot be permitted, in the district court, to object that she was not duly served with notice of the hearing, nor to contradict the record of the county court, in order to show that she did not make any appearance in the suit, or waive the want of notice.

The second assignment of error, is upon the order of the district court, affirming the judgment of the county court, without giving the defendant an opportunity to try the

cause on the merits. The appeal certainly brought up the cause for hearing anew in the district court. Upon the failure of the appellant to prosecute the appeal, the court may dismiss the same, suffering the judgment and determination of the county court to stand. In this instance, the district court affirms the judgment of the county court, and renders judgment against the defendant for the amount allowed by the county court, with interest. This judgment, we must take to have been rendered against the defendant, for want of prosecution, as stated in the motion. We cannot go behind the judgment, to inquire of the incorrectness of the action of the district court, for the reason that no error is affirmatively shown to exist, and until it is shown, the judgment must be taken to be correct. It cannot be said, that the district court denied to the defendant a trial on the merits. By paying the fees required to be paid to the clerk of the district court, on docketing an appeal, and by duly prosecuting the same, the defendant was entitled to a trial anew, in the district court; and it cannot be complained of, if the judgment appealed from, is affirmed for want of such payment, and due prosecution of the appeal.

It is, in the third place, assigned for error, that the district court rendered a personal judgment against the executrix, for which she is personally liable, instead of a judgment against her in her official capacity, for which the estate is liable. The right of the court to render the judgment in either form, is not apparent. It is to be borne in mind, that this is a proceeding in probate, by the plaintiffs, to have a claim against the estate of Carey, allowed by the county court, and to obtain an order for its payment by the executrix. It is to be, in all things, governed by the statute. It is not to be likened to an ordinary suit at law, between parties litigant; and yet, it is so far like it, that there should be both a plaintiff and a defendant. It is to be commenced in the manner required for commencing actions in the district court, and is to be governed by the same rules, in the admission of testimony. Code, sec. 1359,

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1360. The difference between the two modes of proceeding, lies in the fact that, in a suit like the present, there should be no *judgment*, in the sense in which the term is ordinarily used. There is to be an ascertainment of the truth and justice of the claim made against the estate, and when so ascertained, it is to be allowed, and ordered to be paid from the assets of the estate. No execution is to be awarded or issued upon the adjudication. An execution is not the mode pointed out for its enforcement. *Foteaux v. Lepage, ante 23.*

The executrix, and not "the estate of S. T. Carey," should have been the defendant in the suit. No judgment or adjudication could have been made against "the estate" as defendant, as against a natural person. It is a confusion of terms, as well as of ideas, to adopt such a form of expression. This confusion is most notably exemplified in the present record. A judgment is rendered in the county court, against "The Estate of S. T. Carey" as defendant, and the executrix takes an appeal to the district court. In that court, the proceeding is carried on against "the estate of S. T. Carey," as defendant; but judgment is rendered against Martha E. Eubank, executrix, &c., and "The Estate of S. T. Carey," takes the appeal to this court. As the parties have taken no exception to this form of entry and proceeding, in the district court, but have permitted it to pass unquestioned, we have perhaps gone aside in making this much comment upon it. We take occasion, however, while the subject is up, to express our strong disapprobation of the practice of making up the records of the county and district courts, in such carelessness and confusion.

Allowing that the executrix of Carey, in an appeal taken as this is, by "the Estate of Carey," can object to the form of the judgment against her by the district court, we think that the objection made by her is well taken. In the first place, there should have been no judgment of recovery against her. The only question before either the county or district court was, whether the claim be allowed by the court and paid by the executrix, as other claims. In

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the second place, where a judgment is rendered against an executrix, it should be against her as such executrix, to be levied of the goods and chattels of the testator in her hands to be administered. *Thirdly*: In this case, there should have been no order entered, for the issuing of an execution on the judgment. In these respects, the judgment of the district court will be reversed, and ordered to be corrected. In other respects, the judgment will be affirmed. The remarks above, disposes of the fourth assignment of error made by the appellant.

Judgment in part reversed, and in part affirmed.

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Where a negotiation is carried on between parties residing at a distance from each other, by letter, the contract is complete, when the answer containing the acceptance of a distinct proposition, is dispatched by mail or otherwise, provided it be done with due diligence after the receipt of the letter containing the proposal, and before any intimation is received that the offer is withdrawn.

As soon as an offer by letter is accepted, the consent is given, and the contract is completed, provided the party making the offer was alive when the offer was so accepted.

While it is true, that there can be no contract, without the consent of all the parties to it, it is not necessary that their wills should concur at the same instant, if the will of the party receiving the proposition, is declared before the will of the party making it is revoked.

While the consent of one party may precede the other, yet the will of the party offering, must continue down to the time of the acceptance by the other party; and the presumption is, unless the contrary appears, that the will of the party making the proposition, does so continue.

Where on the 25th of November, 1854, M., who resided in Iowa, made an offer by letter, to P., who resided in California, for the purchase of his farm, who, on the 30th of March, 1855, replied, declining the proposition of M., and making a new proposition; and where M., on the 23d of May, 1855, again wrote to P., accepting the proposition made by him; *Held*, That the contract was complete from the moment that M. wrote the letter of the 23d of May, and deposited it in the post office.

6	279
79	509

6	279
92	721

6	279
102	431

6	279
123	649

6	279
132	660
133	358

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As between the parties, a conveyance of real estate by a parent to a child, will be upheld, as being founded upon a meritorious consideration.

Where an agreement between parent and child for the conveyance of real estate, is executory, exists in parol, and is unassisted by the fact of possession and permanent improvements, taken and made upon the faith of such promise, courts of equity will not aid the donee, by decreeing a specific performance of the agreement.

Where the promise of the parent to convey real estate to the child, is clearly, definitely and conclusively established, and where the child, upon the faith of it, has entered into possession, and made valuable and permanent improvements upon the land, the parent will be decreed to specifically perform the agreement.

In such cases, it will not avail the donee, if his improvements are temporary, of but little value, or simply for his convenience, as an occupying tenant. They must be of a permanent character—such as clearly show, that he regards and designs to treat the land as his own, and relies upon the promise of the father.

Where a defect in a bill in equity is one of form merely, or where the case stated in the bill is such that the court can properly proceed to a decree, the insufficiency of the bill cannot, for the first time, be raised on appeal. *Aliter*, where the bill shows a want of equity.

The purchaser of real estate, in the possession of a third person, is bound to take notice of such person's title to the possession, whether his title be legal or equitable.

The possession of real estate is sufficient to put a purchaser upon inquiry, and amounts to constructive notice of the title under which it is held.

J. P. had a number of sons, and had helped all of them, either by giving them land, or means with which to enter the same, or start in business. One of the sons, L., (a twin brother of A.), died in 1848 or 1844, being unmarried, and leaving no issue. L., at the time of his death, was in the possession of eighty acres of land, and held the title, either legal or equitable, as also another tract of land. Whether the legal title was in the father, and the equity in the son, or whether the father's legal right accrued upon the death of L., and as his heir at law, did not satisfactorily appear. The improvements upon the eighty acres, at the time of the death of L., were put there by him, and there was nothing to show that the father had ever expended a dollar upon the land. On his death-bed, L. desired that his father should see that his interest in this eighty should be given to A., and this desire the father promised should be carried out. His other land, L. desired should be given to his brother J. After his brother's death, A. took possession, and made large improvements upon the eighty acre tract, consisting of fencing, and a barn, at an expense of some \$1,000, or \$1,200. During all this time, the father resided near the premises, and had full knowledge of the possession and improvements. On two

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or three occasions he expressed his intention to carry out the will of L., in relation to the eighty, and he uniformly spoke of it as A.'s. A. continued in possession, and enjoyed the rents and profits, to the time of his leaving for California, and after that, it was occupied by his tenants—this possession covering a period of some twelve or fourteen years. In 1854, by correspondence, A. sold the eighty acre tract, with other lands, to M. While M. was negotiating with A. knowing that the legal title was in the father, he called upon him, and obtained his promise to make the deed. Subsequent to this, the father spoke to other persons of M.'s trade with A., and stated that he was glad that M. was to get the place, and that he had agreed to help him make the payments. On bill filed by M. against the father, to compel a specific performance of the promise to make a deed; *Held*, That J. P. should be required to make the deed to M.

Appeal from the Des Moines District Court.

TUESDAY, JUNE 22.

IN CHANCERY. Petition prays the specific performance of a contract in relation to certain real estate. Abner Pierson is charged with holding the legal title to one hundred and sixty acres of the land, and the equitable title to the other eighty—the legal title to that, being in the respondent, John Pierson, the father of the said Abner. The other respondent, O. B. Matteson, claims to be a purchaser for a valuable consideration, without notice of the outstanding contract with complainant.

In 1854, Abner Pierson resided in California, and the complainant, his brother-in-law, in or near Burlington, in this State. In the autumn of that year, a correspondence was commenced between them, in relation to the sale of this land, which was continued until in May, 1855, and which, as complainant insists, resulted in a contract by which he purchased the same. This correspondence will be found in the opinion of the court. Prior to this time, Abner forwarded to Starr & Phelps, a power of attorney to mortgage or sell his lands. It proved to be defective, and on the 2d of January, 1855, they forwarded him another, with instructions as to the manner of executing and acknowledging the same. On the 11th of May, he exe-

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cuted the power of attorney, but for some cause, the names of Starr & Phelps were erased, and that of Samuel Leibrick, the brother-in-law of said Abner, substituted.

On the 7th of June, 1855, John Pierson sold the entire land to O. B. Matteson, for \$24,000, and executed a bond for a deed, to be made on or before the first of April, 1856. The power of attorney was received by Leibrick on the 12th of June, who, on the same day, made a deed as the attorney of Abner, to Matteson, for the quarter section, which he deposited with Thomas, of the banking house of Greene, Thomas and Company. This deed Matteson refused to accept, and it was then deposited with M. D. Browning, one of the attorneys of respondents. Leibrick, about the time of making the deed to Matteson, but whether before or afterwards is not clearly shown, received three or four thousand dollars from John Pierson. Pierson probably received it from Greene, Thomas & Co., as the bankers of Matteson, but of this there is no satisfactory evidence. On the 25th of May, 1855, Moore informed the tenants in possession of the premises under Abner, that he had purchased, and they acknowledged him as their landlord, and agreed to pay him rent. Most of the permanent improvements of the farm are on the eighty acres—the title to which is in John Pierson. These improvements were made by Abner, with his father's knowledge, and under assurance that he would convey it when required. Moore tendered the money due, and offered to fulfil his contract to Leibrick, soon after he got the power of attorney—perhaps the same day. For the other material facts, see the opinion of court. The respondents appeal.

David Rorer, with whom were *Browning & Tracey*, for the appellants.

I. Was there any contract actually consummated betwixt Moore and Abner Pierson? This is at least doubtful. Moore exhibits a letter from Abner, dated 30th of

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March, 1855, and claims to have accepted by letter the offer therein contained. He calls for the production of his letter of acceptance. It is produced, but is in answer to a letter from Abner of the 3d of April. This letter of the 3d of April, is not by Moore produced. The offer contained in it, is the one he claims to have accepted. This court has no means of knowing what that offer was. The letter given by Moore, in exhibit, does not correspond with the one stated in the bill. The bill alleges that the letter from Abner, was received about the first of June, 1855, and that on its receipt, he immediately wrote, accepting, and immediately procured the money to make the first payment; whereas, in another place, it states that he was ready with the money some days before the receipt of said letter, in anticipation that Abner would accept an offer previously made by said Moore. In this particular the bill is contradictory, as well as in relation to the date of the letter. A pleading thus contradictory loses much of its force. Such conflicting statements are evidence against complainant. 3 Greenl. on Evidence, section 273.

It is argued that the reference to the letter of the 3d of April, by Moore, in his letter to Abner, is a mistake; but of this there is no proof, nor does the bill lay the foundation for proof in that respect—such mistake is not charged in the bill. It is evident, then, that Moore never answered the letter of the 30th of March, but received from Abner a second letter, dated the 3d of April, as promised in the former one, particularizing certain payments to be made. This second letter Moore alone could produce. The conduct of a party in withholding evidence, exclusively within his power, raises a presumption in law, that if produced, it would militate against him. 1 Starkie on Evidence, 34, sec. 16; 1 Greenl. on Evidence, sec. 37.

The bill states that the letter of the 30th of March, was received by Moore about the first of June, and that he answered it as soon as received. The answer is to one dated the 3d of April, and bears date of the 23d of May. This, and the evidence of Mr. Phelps, clearly proves the receipt

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of the letters of Abner Pierson, to have been long before the time alleged, and that the acceptance of the proposition was not promptly made, but was the result of an after-thought, growing out of the sudden rise of the property indicated by Matteson's purchase.

That a second letter was written by Abner, and received by Moore, we have every reason to believe. In the letter of the 30th of March, Abner says: "I would like the first payment made on the first of June next, and the accounts there against me, where there is no settlements to be made, paid up, which I will inform you in another." So the proposition was not complete, until the receipt of another letter should more definitely fix the terms. That such letter was written and received, and was dated the 3d of April, is clearly indicated. Why is it not produced by Moore? It is part and parcel of the contract. The fraudulent effort to pass it over, and accept the imperfect offer of the 30th of March, is detected by these circumstances. Moore was bound to accept promptly, and within all the terms. 1 Parsons on Cont., 404; *McCulloch v. Eagle Ins. Co.*, 1 Pick., 277; *Eliason v. Henshaw*, 4 Wheat., 225; *Holland v. Eyre*, 2 Simmons & Stuart, 184. Then Moore has not accepted within time, if at all. He has not only greatly delayed an answer, but into that answer introduced new terms. Under all the circumstances, it may well be doubted, if any contract was, in legal contemplation, ever consummated. Where there is doubts, equity will not enforce. *Carr v. Duval*, 14 Pet., 77; *Haddleston v. Brisloe*, 11 Ves., 522; *Holland v. Eyre*, 2 Simmons & Steuart, 194. To make a contract, both parties must mean the same thing, and in the same sense. 1 Parsons on Conts., 6.

II. The bill states an unconditional proposition, by the letter of the 30th of March. The letter shows a proposition to sell on terms stated, and to be stated in a subsequent letter, if the elder Pierson would convey the eighty. Complainant must establish the very case stated, and not

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a different one. *Green v. Storm*, 8 Sand. Ch., 305; *Carr v. Duval*, 14 Pet., 77; *Mundorff v. How.*, 4 Md., 316.

III. Supposing a contract to have been consummated, is it such an one, in point of certainty, as equity will enforce? and if so, is that contract so evidenced in writing, as that equity will decree its specific performance? The letters do not identify the premises. The words "my farm," and like expressions, are used. An agreement to be specifically enforced, must not only be certain in its terms, and as to the subject matter, but that certainty must appear from the written contract, or letters, or from some writing therein referred to, so as to be understood without the aid of parol testimony. *Willard's Equity*, 267; *Kendall v. Almy et al.*, 2 Sumn., 295; *St. Johns v. Benedict*, 6 Johns. Ch., 11; *Graham v. Call.*, 5 Mumf., 369; *Dalzell v. Crawford*, Parsons' Select Cases, 37; *Parish v. Koons*, Ib., 95 476; *Stoddard v. Tucker*, 5 Md., 18; *Shelton v. Churoh*, 18 Miss., 774; *Colson v. Thompson*, 2 Wheat., 336; 2 Leading Cases in Equity, 524; *Kay v. Curd*, 6 B. Monroe, 100.

The letters use no descriptive terms. If it be said that Abner Pierson's letter refers to the agency of Starr & Phelps, the answer is, that the power of attorney they then had, as also the one to Leibrick, include only the quarter section. The eighty acre tract is not mentioned in either. So far as to that eighty, the whole case rests in parol. In parol, not only as betwixt Moore and Abner Pierson, but also, as betwixt John Pierson, Sen., and Abner Pierson, and of course as to Moore, who claims under Abner. The bill alleges the legal title to the eighty, to be in said John Pierson, Sen., in trust for Abner, but does not state the particulars of the trust. The evidence, however, shows it to rest in *parol*—a mere verbal promise to give it to Abner. This brings us to the next proper division of our subject.

IV. A parol gift of land, by father to son, will not be specifically enforced in equity; even though accompanied by possession. It will not be enforced against the father while

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living, nor against his heirs at law, after his death. Nor in any case, nor as betwixt any persons, nor in favor of an assignee of such *promises*, however valuable a consideration may have been paid for such transfer. *Banks v. Mayo's heirs*, 3 A. K. Marsh., 435; *Pinckard v. Pinckard*, 23 Ala., 649; *Harder v. Harder*, 2 Sand. Ch., 17; *Darlington v. Cole*, 1 Leigh., 36; *Black v. Cord*, 2 Har. & Gill, 100. Such parol gift is not only within the statute of frauds, but is *voluntary*; and equity will not enforce specific performance in favor of *volunteers*.

V. Equity will not enforce speculative contracts. Moore is attempting to speculate upon his superior means of knowledge, and upon Abner Pierson's ignorance of the rise of property pending the negotiation, and upon the confidence reposed by Abner in Moore, as a *brother-in-law*. *McKay v. Carington*, 2 McLean, 59; *Lockridge v. Foster*, 4 Scam., 573.

VI. The bill charges that John Pierson, Sr., advised Moore to make the purchase, but of this there is no proof. Moore states in his letter to Abner, that such is the fact, but that letter was called for by Moore, and is not legal evidence. Moreover, the testimony of Samuel Leibrick, that Moore denied having heard from Abner, until the Matteson purchase occurred, goes far to negative the idea that said Pierson so advised Moore, or that Moore ever mentioned the subject to him. It is apparent, from the whole case, that if Moore contemplated accepting at all, that fact was revealed to Starr & Phelps only, and was sedulously kept secret from not only Abner, but from his friends here, at least till the 23d of May, the date of Moore's letter to Abner. The great rise of the property, may have been motive enough for such concealment, until by a full power of attorney, such advantage could be firmly fixed. But such oral advice would not bind Pierson, if given. *Hawkins v. King*, 2 A. K. Marsh., 109.

VII. The agreement, to be enforced, must be mutually binding, so as to be reciprocal, and capable of being enforced by the adverse party. Now, could the elder Pierson have

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forced Abner to receive the gift? To accept a deed as a mere gratuity? If not, then Abner could not enforce performance against him. Nor can Moore; for Abner could sell no greater rights to Moore, than he himself possessed. It does not matter that Moore was to pay Abner a consideration. The contract is still a voluntary one, as betwixt Abner and his father. Equity will not enforce it, because it is voluntary. Equity will not enforce it, because it is not mutual. And if equity will not so enforce it against John Pierson, Sen., much less will it enforce it against Matteson, who purchased of him, for a valuable consideration—a consideration, double the amount which Moore was to pay Abner. *Parker v. May*, 3 Marsh, 463; *Acker v. Phoenix*, 4 Paige, 305; *Mintum v. Seymour*, 4 Johns. Ch., 479; *Dawson v. Dawson*, Dev. Eq., 93; 1 Lead. Eq. Cases, 239; *Bebb v. Smith*, 1 Dana, 580; *Tiernan v. Poor*, 1 Gill & Johns., 217; *Duval v. Myers*, 2 Md. Ch. Dec., 401; *Willard's Equity*, 263; *Benedict v. Lynch*, 1 Johns., Ch. 307; *German v. Machin*, 1 Paige, 288; *Banks v. Mayo's Heirs*, 3 A. K. Marsh, 435. In the latter case, the promise to give the land, was in writing, but being voluntary, equity refused to enforce it, in favor of a purchaser from the person to whom the promise was made, although such purchaser paid a large consideration.

VIII. By the same rule of mutuality, Moore cannot compel Abner to convey the quarter section alone, as Abner could not compel him to receive it without the eighty, which Abner has neither capacity nor power to convey. Equity will not enforce a contract by halves, nor of an imperfect title. *Hepburn v. Auld*, 5 Or., 262.

IX. The possession of Moore will not avail him. If the contract was not, as to the elder Pierson, voluntary, yet it must clearly appear that Moore's entry into possession, was connected with, and referable to the contract, and that he took possession by the known permission of Abner. *Lord v. Underdonck*, 1 Sand., Ch., 46; *Given v. Colder*, 2 Desau., 171; *Thompson v. Scott*, 1 McCord Ch., 39; *Jervis v. Smith*, 1 Hoff. Ch., 470. It cannot be pretended

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that the possession was by the consent of Abner, for the evidence shows that it was taken, after he united in a sale to Matteson.

X. It is not material whether Matteson had notice or not. He is a purchaser for value, contending against one claiming under a mere volunteer.

XI. If the bill was confessed, or not answered, by the elder Pierson, equity would not decree against him, as to the eighty acres, nor against those holding under him, under the evidence of this case, explaining the origin and nature (as it does) of the alleged trust. He was not bound to complete the gift by a conveyance. *Banks v. Mayo's Heirs*, 3 A. K. Marsh, 435.

XII. There is gross inadequacy of price, in reference to the time Moore attempted to close the contract. Eight months intervened during the treaty. The value, at the commencement of the negotiation, is not a fair test. Moore had all the advantages of knowledge, while the vendor was absent, and without means of knowledge of the intervening rise of property. That there was a rise of one hundred per cent., is shown by the price paid by Matteson. This, of itself, will cause equity to refrain from enforcing a performance. *Seymour v. Delany*, 6 Johns., Ch., 222; 3 Cow. S. C., 445; *Clicknel v. Oglevie*, 1 Deaus., 250; *Power v. Hale*, 5 Foster (N. H.) 145; *Osgood v. Franklin*, 2 Johns. Ch., 24; *Osgood v. Franklin*, 14 Johns., S. C., 527; *Clark v. Railroad Co.*, 18 Barb., 350; 2 Story's Eq., sec. 769. To obtain a decree for performance, the price must be nearly adequate. *Lucas v. Barrett*, 1 G. Greene, 525.

XIII. Specific performance is not decreed as a matter of right, but is of the sound discretion of the court. *Young v. Daniels*, 2 Iowa, 125; *Clark v. Railroad Co.*, 18 Barb. 350; *Blackwilder v. Lovelass*, 21 Ala., 371.

J. C. & B. J. Hall, Starr & Phelps, and *Robertson*, for the appellee. [The counsel for the appellee failed to furnish the reporter with a brief of their argument.]

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WRIGHT, C. J.—The objections made by respondents to the decree below, may be considered under four heads: *First*: That no contract was ever made between complainant and Abner Pierson, which can be enforced. *Second*: If any contract was made, Pierson was induced to enter into it by fraud and misrepresentations of complainant. *Third*: That Abner Pierson never had any right, legal or equitable, to eighty acres of the land; and that as to this, there can be no decree in favor of complainant, and, therefore, his action must fail. *Fourth*: That Matteson was an innocent purchaser, without notice of the contract between Pierson and complainant; and, therefore, has the superior right to the land.

The evidence of the contract, is contained in certain correspondence between complainant and Abner Pierson, and is substantially as follows: In his letter of the 25th of November, Moore, after speaking of the family relations, and various other matters, uses this language: “You spoke of the sale of your farm here. I hardly know what to say, just now. I could have received some four to six thousand dollars last summer, at the time I wrote to you. I will be willing to give you ten thousand five hundred dollars for the farm and stock that you left. That is, if you conclude I can have it; that is, if when I get an answer from you, I will answer it immediately, and will pay the one-third in sixty days, the balance in one and two years. That is, if your father will make the deed for the eighty where the barn stands. I think he will, but it is just as the notion takes him. If I do not buy it, I will take it and sell it as you order, and do the best I can for you. Still, I should much rather you would come back and see us, and then, if we could make a deal, well; if not, no harm done. If times keep as they are, I will take it at that; but if times get worse, I could not.”

Pierson, in answer to this, on the 30th day of March, 1855, uses this language: “It has been sometime since I received your letter, but I now undertake to answer. I have been in a study for sometime as to the disposal of my

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land. Sometime ago, I sent a power of attorney to Starr & Phelps, but it not being properly executed, they sent me an instrument in legal form, and I have nothing to do but to sign it, and get the county seal to it, which I will do in a few days. But as you make me an offer, I consider it my duty to say something in reply. The terms will suit me; but the offer, or amount, does not exactly suit. I think it hardly sufficient. I think you can muster up a few hundred more than you offer. If I understand you, your offer was ten thousand five hundred dollars, for the farm and stock I left there. Well, you can give me five hundred more, and take the farm with the three horses, and what farming implements there are on the farm belonging to me, and have possession of it on the receipt of this, if you consider it a trade, and my productions of the farm, or that which would fall to me this year. One-third of the amount paid down, or as soon as you possibly can; one-third in one year; and the remaining one-third, in one year from that time; that is, in two yearly instalments—your own proposition—and payable in notes of five hundred dollars each, drawing ten per cent. from date, with mortgage for the amount on said property. I would like the first payment made on the first of June next, and the accounts there against me, where there is no settlement to be made, paid up, which I will inform you in another letter. You can make up your mind as to what you will do, by the time the power of attorney reaches Starr & Phelps, and if you conclude to take it, draw writings, as I have directed, or stated to you. I shall authorize them to sell for twelve thousand, and no less—one-third paid down, and the remainder in one, two, and three years; notes drawing ten per cent. interest from date, with mortgage or deed of trust. Write as soon as you receive this, respecting what you can, or will, do. I shall send the power of attorney next mail, and will have them receive a deed from father for the eighty south of the road. I will also state the terms on which you are to have the place, provided you can come up to the mark, or the terms. I shall authorize them to sell. If

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it suits you better, make the arrangements at once, and I will be just as well suited, and at less expense. This is about all I have to write on this subject, at present."

On the 23d of May, 1855, Moore writes: "I have received yours of the 3d of April." He then proceeds to refer to different members of the family—of their health and engagements—and as to the farm trade, writes thus: "As regards your proposition of the farm, I have concluded I would take you up at your offer, although it is a big pile of money. But I am in the country, and farming it some, and find that I have not room to do anything." He then gives some reasons why his location was an unpleasant one, and proceeds: "I had concluded to sell and go to town, or some other place, before yours came to hand. I have several offers made, which I will close with some of them. I wish you to write to me and to John, (a brother of Abner's,) and say to him just what I am to get. I have not seen John since I received yours. He is now gone to Council Bluffs. You had a young horse colt, that you left, and I learned by John's boys that he claimed it. I expected to get all that you left and was entitled to, of horses, wagons, &c. So, I wish you to write to John, so that there will be no misunderstanding. I am sorry he is not at home. I suppose you will fully authorize Starr to have your affairs straightened up. It was with some persuasion, that I got your father to consent to make a deed for the south eighty. I think I will be able to meet it as you stated. Perhaps I cannot meet all of the first payment in two or three weeks, but I shall be able to arrange it soon."

In May, 1855, Moore went to Starr & Phelps, produced the letter received by him from Pierson, and expressed his readiness to comply with the terms and take the farm—stating that he had the money and was ready to pay, and offered to make a formal tender of it. His offer was declined by them, for the reason that they had not then received any authority to act; but that as soon as they re-

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ceived the power of attorney, they would do whatever Pierson directed. He also, on the 25th of that month, notified the tenants that he had bought the place, and assumed to control and direct them.

We think the contract was complete from the moment that Moore wrote the letter of the 23d of May, and deposited it in the office. From that time, each party came under an obligation to the other, and each acquired a reciprocal right to what was promised by the other. And such a transaction amounts to a contract. Powell on Cont., 4. From the time the assent was thus given, there was a concurrence of intention between these parties. Pierson promising to do a certain thing, and Moore accepting the same, and making a promise in return. This also, according to Potheir, (Ob., 1 Ch.) would amount to a contract. It also comes up to the definition of a contract by Chitty, (Cont., 9)—to-wit: a definite promise by the party charged—accepted by the person claiming the benefit of such promise—a request on one side, and an assent on the other.

Where the negotiation is carried on between parties residing at a distance from each other by letter, the rule, as recognized by Chancellor Kent, and, indeed, we may say, at this time, by all the authorities is, that the contract is completed when the answer containing the acceptance of a distinct proposition, is despatched by mail or otherwise, provided it be done with due diligence after the receipt of the letter containing the proposal, and before any intimation is received that the offer is withdrawn. As soon as an offer by letter is accepted, the consent is given, and the contract is complete, provided the party making the offer was alive when the offer was so accepted. 2 Kent, 477; *Maction v. Frith*, 6 Wend., 103; *Adams v. Lindsell*, 1 Barn. & Ald., 681; *Brisbon v. Boyd*, 4 Paige, 17; Chitty on Cont., 14. The case of *McCulloch v. Eagle Ins. Co.*, 1 Pick., 278, so far as it holds that the offer could not bind the person making it, until he received the letter announcing the acceptance, is in conflict with those above cited, and seems not to have been followed in subsequent cases in-

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volving the same point. *Averill v. Hedge*, 12 Conn., 436; *Frith v. Lawrence*, 1 Paige, 434; *Canal v. Railroad Co.*, 4 Gill & Johns., 1; *Fitzhugh v. Jones*, 6 Manf., 88; 1 Parsons on Cont., 406, Note K.; 9 How., 390; 4 Wheat., 228; Story on Cont., sec. 384. There can, it is true, be no contract without the consent of all the parties to it, but it is not necessary that their wills should concur at the same instant, if the will of the party receiving the proposition is declared before the will of the party making it is revoked. And while the consent of one party may precede the other, yet this will of the party offering, must continue down to the time of the acceptance. Unless the contrary appear, the presumption is, that this will does continue, upon the principle of the common law, that wherever the existence of a particular subject matter or relation, has been once proved, its continuance is presumed until the contrary is proved, or till a different presumption is afforded by the nature of the subject matter; 6 Wend., 103; 16 East, 55; 3 Stark. Ev., 1252.

Applying these well settled rules to the case before us, we have no difficulty in determining it. Taking the correspondence in connection, it shows a distinct proposition on the part of Pierson, which was clearly and unconditionally accepted by complainant. This acceptance was declared with due diligence, also. For while it does not definitely appear, when Moore received Pierson's letter, it is manifest from its date, that it could not have been many days before answered. And this position is strengthened by the further fact, that Pierson said in this letter, that he should forward the power of attorney by the next mail, and this was not received by Leibrick, until near three weeks after Moore wrote his letter of acceptance.

It is suggested, however, that Pierson's letter is dated March 30th, and that Moore, in his letter, accepts a proposition made in one of April 3d, 1855, and that there is, therefore, no evidence of what proposition he did accept. It is true that Moore, in his letter of May 23d, does say that he has received his (Pierson's) letter of April 3d. To

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his bill, however, he attaches a copy of the letter, dated March 30th, and avers that the proposition contained in this letter, is the one which he accepted. This averment is not denied, or rather, it is not claimed or pretended in the answer of Pierson, that he made any other proposition, or wrote any other letter of the 3d of April, or of any other date, changing the conditions contained in the one upon which complainant relies. Under such circumstances, we think it but reasonable to say, that Moore mistook the date of the letter, and especially so, when we consider that if there was another, Pierson knew it, and it was easy for him to have so averred, and called upon complainant to produce it.

It is also urged that the contract was not complete, for the reason that Pierson speaks of intending to write subsequently, about the payment of some debts owing by him; and for the further reason, that Moore refers to some misunderstanding or possible difficulty as to a portion of the personal property. The payment of these debts, however, was in no manner connected with the price to be paid for the land, or the terms of payment. There was nothing for Moore to know in relation to those debts, upon which his acceptance of the proposition was to depend. It was not suggested, even by Pierson, that the making of the contract was to depend upon Moore paying those debts; or that he would, in a subsequent letter, fix additional terms. It is quite evident that Pierson, when he wrote this letter, expected the whole matter to be closed up for him by his attorneys, Starr & Phelps, and the reference in this letter to his debts, was made to advise Moore that he wanted them paid, of which debts he was to inform him in another letter.

As to what Moore says about the personal property, it will be observed, that though he speaks about his desire to have a perfect understanding as to the property, he gives no intimation of waiving or delaying, for this reason, his acceptance of the terms, or trade, proposed. In *Fitzhugh v. Jones*, 6 Munf., 83, the owner of the land accepted the

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terms proposed by one offering by letter to purchase, but stated in his reply, that the purchaser must take the responsibility of establishing the lines. The person offering to buy, answered, assenting to the terms, but expressed a wish that the owner's agent would attend to the settlement of a portion of the boundaries. It was held, that there was a complete contract for the sale of the land. The two cases are not unlike. And that Moore understood that the contract was complete, and did not intend to make it depend upon what personal property he got with the farm, is manifest from the fact, that he immediately advised the tenants of the purchase—immediately and promptly assumed the control of the place—within a few days, showed the letter to those whom he had reason to suppose were, or would be, Pierson's attorneys—and declared his acceptance of the terms, and readiness to comply. If he regarded that the completion of the contract was to depend upon the personal property he might receive, his course with the tenants and attorneys was, to say the least of it, inexplicable and unreasonable.

As to the second objection, that Moore procured this contract by fraud and misrepresentation, we are very clear that it is not sustained by the proof. To sustain this position, respondents rely almost entirely upon the fact, that the price to be paid, was grossly inadequate—that complainant was to pay \$11,000, whereas Matteson agreed to, and was to pay \$24,000. At the time this negotiation was commenced, in the autumn of 1854, the weight of the testimony is, that the land was not worth to exceed \$50 per acre. In the spring, it advanced very rapidly, as did all the lands in that vicinity, and indeed, throughout the State. It is quite evident that by the terms of the contract, as finally settled in May, 1855, Moore made what is admitted to have been a good bargain. When he made his first offer, however, and when Pierson wrote to him, the terms were not so favorable to Moore. Had Pierson been on the place the previous autumn, it is not improbable that the trade would then

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have been closed. If, without fraud or misrepresentation on his part, Moore succeeded in obtaining what was to him an advantageous contract, it was his right, and he is entitled to the benefit of it. Was there any fraud? It does not appear that, at any time, he made any representations as to the value of the land. He, in one or both of the letters, speaks of the condition of the railroads being constructed near the land, and what he then said is fully sustained by the proof. It will be seen, also, that he expressed a wish that Pierson should return, and see and judge for himself. His letter also shows, (and the testimony of one or more witnesses proves the same fact), that he consulted with Abner's father about the trade, and that the latter finally consented to make a deed for the eighty acres in his name. Abner not only had a father living near the land, but two or more brothers, his brother-in-law, Leibrick, and other friends and relatives, in the same vicinity, with whom he had every opportunity to correspond, and learn the actual value of the land. If the father supposed that complainant was obtaining an unconscionable advantage over his son, it would seem that he would promptly have refused to convey the eighty, the legal title to which was in him, and as promptly have advised his son not to accept the offer.

We acknowledge that we have felt strongly inclined to give to Abner, the benefit of the, at least, seemingly better contract made by the father with Matteson. And was there any fair ground for concluding, that complainant obtained his contract by fraud, or by the use of any other than fair means, we should most readily so hold. We are unable to discover, however, that complainant has been guilty of any misrepresentation, or that he resorted to any other than the most honorable, open and candid means in making the purchase. Under such circumstances, as already suggested, we are not at liberty to deny to him his rights under his contract. For, while Abner Pierson may suffer largely by being held to his contract with Moore, and as a consequence, deprived of the benefit of the con-

tract with Matteson, it is but the result of his negotiation fairly entered into. It may be a case of great hardship, but this cannot change the relative rights of the parties. Hard cases must not be allowed to make bad equity, any more than bad law.

We are next to inquire, whether Abner Pierson had any right to the eighty acres, held by his father. It seems that John Pierson had a number of sons, and had helped all of them, either by giving them land, or means with which to enter the same, or start in business. One of his sons, Levi, a twin brother of Abner, died in 1843 or 1844, being unmarried and leaving no issue. He at that time was in possession of this eighty, and held the title, either legal or equitable, as also another tract of land. Whether the legal title was in the father, and the equity in the son, or whether the father's legal right accrued upon his death, and as the heir of Levi, does not satisfactorily appear. The improvements upon the eighty, at the time of Levi's death, were put there by him, and there is nothing to show that the father ever expended a dollar upon it. On his death-bed, Levi desired that his father should see that his interest in this eighty, should be given to his brother Abner; and this desire the father promised to see carried out. His other land, Levi desired to be given to his brother, Johnson Pierson. After his brother's death, Abner took possession, and made large and valuable improvements upon this eighty—which adjoins the one hundred and sixty acres, now also in controversy, and is, in fact, a part of the farm. These improvements consist of fencing a large portion of it, and building a barn, at an expense of some \$1,000 or \$1,200. During all this time, the father resided near the premises, and had full knowledge of the possession and improvements. On two or three occasions, he expressed his intention to carry out the will of Levi, in relation to this eighty, and he uniformly spoke of it as Abner's. Abner continued in possession, and enjoyed the rents and profits to the time of his leaving for California, and after that occupied

it by his tenants—this possession covering a period of some twelve or fourteen years. When Moore was negotiating with Abner, knowing that the legal title was in the father, he called upon and obtained his promise to make the deed. Subsequent to this, the father spoke to other persons of Moore's trade with Abner, and stated that he was glad that Henry was to get the place, and that he had agreed to help him make the payments.

Under these circumstances, shall John Pierson be now required to convey this eighty to Moore? And upon this question, we have had more doubt than any other in the case. We have concluded, however, that the position of respondent (John Pierson), cannot be sustained. Our reasons for this conclusion we will briefly state.

As between the parties, a conveyance by a father to a child will be upheld, as being founded upon a meritorious consideration. When the agreement is executory, however, exists in parol, and is unassisted by the fact of possession, and permanent improvements, taken and made upon the faith of such promise, the courts will not aid the donee by decreasing its performance. Where, however, the promise is clearly, definitely, and conclusively established, and where the child, upon the faith of it, has entered into possession, and made valuable and permanent improvements, cases are not wanting that recognize the right of the donee to claim and require a specific performance. *Stewart v. Stewart*, 3 Watts, 253; *Young v. Glendering*, 6 Watts, 509. "The opposite rule," says Tyghlman, C. J., in *Tyler v. Eckhart*, 1 Binn., 378, "would enable the parent to practice a fraud, by making a gift which he knew to be void, and thus entice his child into a great expenditure of money and labor, of which he intended to reap the benefit himself." In such case, however, it will not avail the donee, if his improvements are temporary, of but little value, or simply for his convenience as an occupying tenant. They must be of a permanent character—such as clearly show that he regards, and designs to treat the land as his own, and relies upon the promise of the father.

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We are aware that there are cases holding the opposite view. Some of them, that have been so classed, however, it will be found, arose between the donor and his creditors. *Rucker v. Abell*, 8 B. Monroe, 566. This case is not of that character, and the distinguishing element is appreciable at once to every professional mind. In others, again, it did not appear that possession was taken, or the improvements made upon the faith of the undertaking of the donor. *Adamson v. Laub*, 3 Blackf., 446. In another case, it did not appear that the donee had put any improvements upon the land. *Black v. Cord*, 2 Har. & Gill, 100. The case of *Pickard et al. v. Pickard's Heirs*, 23 Alab., 649, is quite like this, and yet unlike it, in one important particular. There the donor did not, by his silence or words, induce a third person to purchase of the donee. If he had, in the language of the judge in that case, when referring to *Stone v. Button*, 22 Alab., 543, "it would have amounted to a gross fraud, to permit him to disaffirm the transaction, and avoid the sale which he had superinduced, and afterwards sanctioned."

And without now determining that the complainant would be entitled to relief, if the case stood alone upon proof of the gift, and possession and improvements made, upon the faith of the promise, we think it would be unconscionable and inequitable to deny it, when we take into consideration the further fact, that the father, by his own positive and unambiguous acts, induced the trade and sanctioned it. It is not a case even where the owner of land remains silent, when he knows that other parties, in his presence, are about to do some act which they would not, if they knew of his title. But he encouraged the purchaser—promised Moore that he would make the deed—proposed to assist him in making the payments—and afterwards expressed his satisfaction that the land was thus to be kept in the family. Under such circumstances, he is estopped, in a court of equity, from disputing the validity of the purchase, or the right acquired by virtue of the contract. Story's Eq. Jur., sec. 835; *Stone v. Barker*,

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6 Johns. Ch., 166; *Pickard v. Sears*, 6 Adolph. & Ellis, 474; *Lucas v. Hart*, 5 Iowa, 415. Respondents further object that the bill does not set out or state the particulars of the promise, and that therefore there can be no decree for complainant, as to this eighty acres. It is true, that the bill is not as full and explicit in this respect as it might be; but we do not think the defect is one of such substance or materiality, as to avail respondents at this time. A want of equity in a bill—or the fact that taking it all as true, the complainant is not entitled to the relief prayed for—may be taken advantage of on the final hearing, or on appeal. Not so, however, if the defect is one of form, or if the case stated is such that the court can properly proceed to a decree. Story's Eq. Plead., 528; *Kriechbaum v. Bridges and another*, 1 Iowa, 14.

The fourth and last point to be considered, is that Matteson was a purchaser, without notice, for a valuable consideration. As to this, we have no difficulty. For the one hundred and sixty acres, he never had any contract with any person authorized to bind or contract for the owner, Abner Pierson. His contract was with John Pierson, and it is not pretended that he had any authority or right to sell this portion of the land. As to the eighty acres, while the legal title was in John Pierson, the equity and occupancy was in Abner, or in Moore, his vendee. Matteson was on the premises and examined them, and found that John Pierson was not in the possession. The possession being in another, it was his duty to inquire into its character, and by what right the occupants held. *Lash v. Butch*, 4 Iowa, 215. The purchaser of real estate, in the possession of a third person, is bound to take notice of such person's title to the possession, whether his title be legal or equitable. *Johnston v. Glancy et al.* 4 Blackf., 94; *Moreland v. Lemasters*, Ib., 383. Before Matteson purchased, Moore, as we have before shown, informed the tenants of his purchase, and that they held under him. By making the proper inquiry, Matteson would have ascertained that the persons in possession were not the ten-

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ants of John Pierson, but of Abner, if not Moore. He would have found that John Pierson had not been in possession for some fourteen years, if ever; and that all the improvements were made by other persons. The possession was sufficient to put him upon inquiry, and amounted to constructive notice of the title under which it was held. So that, without determining whether the testimony shows that he had actual notice, (a question, perhaps, not free from difficulty), we think, for the reasons above stated, that he cannot be said to be a purchaser without notice. We give no effect to the deed made by Leibrick, in considering this part of the case, from the fact that it does not appear to have ever been delivered. Indeed, it is shown that Matteson refused to receive it, preferring to rely upon the bond which he held against John Pierson.

We conclude, therefore, that the decree below must be affirmed.

GRASH v. SATER *et al.*

In trespass, where the defendant answers, denying the trespass as alleged in the plaintiff's petition, and alleging matter in justification, the plea of justification does not confess the trespass, so as to dispense with proof of it on the part of the plaintiff.

Where in an action of trespass, for taking personal property, the defendants filed a joint answer, denying the allegations of the petition; and where, at a subsequent term, without any leave to amend their answer, or to file a new answer, being granted, one of the defendants filed a separate answer, admitting the taking, and justifying under a writ of attachment, and the other two defendants filed a joint further answer, justifying under the other defendant, to which answer there was a replication; and where the court instructed the jury, that under the pleadings the trespass was admitted, and plaintiff need not prove it; and that plaintiff had a right to recover, unless the defendants had proved the matter of justification; *Held*, That the last answers were not intended as a waiver of the answer in denial, and that the court erred in giving the instruction.

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121	458

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Appeal from the Henry District Court.

TUESDAY, JUNE 22.

Action for a trespass, in pulling down plaintiff's house, carrying away the material, and destroying plaintiff's property therein. The defendants answered first, by a general denial. Afterwards, Thomas P. Sater filed a special answer, justifying as a constable, holding a writ of attachment in an action by the two other defendants, against the plaintiff. The other defendants also filed a special answer, justifying under, and by command of, the said Thomas P. Sater, as constable. Trial, and verdict and judgment for the plaintiff. The defendants excepted to certain instructions given by the court, at the request of the plaintiff, and filed a motion in arrest of judgment. The defendants appeal; and assign as error the giving the instructions referred to, and the overruling the motion in arrest. These appear more fully in the opinion of the court.

C. Ben Darwin, for the appellants.

David Rorer, for the appellee.

WOODWARD, J.—In the defendant's argument they say that the court wrongly ruled, that there was no sufficient answer in denial. It does not appear from the record, that the court ruled this, nor is it necessarily involved in the instructions given, and the first error assigned. They also claim that the court erred in ruling that by the justification, the defendants waived the denial. This is rather an inference of the party, and a construction placed upon the court's rulings, for the court did not so rule in terms; and what they did hold, is fairly susceptible of quite a different meaning.

It will be necessary to state something of the proceedings in the cause, in order to a proper understanding of

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the case. The action was pending from May, 1855, to August, 1857. It was commenced in the county of Des Moines, and the venue was changed to Henry. In November, 1855, the defendants filed their joint, general denial of each, every, and all the allegations of the petition. At this term the cause was continued, and at the April term, 1856, the venue was changed. There is then no record entry from this term, till that of August, 1857, in Henry county. There is no record of a motion, or of leave, to amend the answer, or to file a new answer, but in August, 1857, the transcript shows that there was filed "an answer by defendants, in the words and figures following," &c., which commences thus: "Defendant, Thomas P. Sater, makes a separate answer and defence; and, admitting the taking, justifies, and says, that on the 9th of February, 1855, an attachment was duly and legally issued," &c., proceeding to justify under the writ. The other two defendants, also, come, and for a further answer say, that they aver and fully rely on the facts set out in the plea of Thomas P. Sater, and proceed to plead that they acted under him and by his authority. To these answers there is a replication. Trial, verdict and judgment for the plaintiff.

The only question in the case, arises from the ruling of the court upon these pleadings. Coming to the question whether the plaintiff should make out a case first, or whether the defendants admit the taking, and assume the burden of proving their justification, in the first instance, the court instructed that, under the pleading, the taking is admitted, and plaintiff need not prove it; and that plaintiff had a right to recover, unless the defendants had proved the matter of justification.

It does not appear clearly whether the court considered the former answer as waived by the latter, as is contended in a part of the argument; or whether they held that the justification was, in its legal effect, a waiver, as being inconsistent with the first answer. We have had some doubt whether the last answers, were not intended

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as substitutes for the first, considering the lapse of time, and that there is no entry of a motion for leave to file additional answers. But, upon the whole, we do not consider the last answers to be intended as a waiver of, or substitute for, the first; and this view is supported by the answer of two of the defendants, who say they make it as a "further answer." The words "admitting the taking," in the answer of Thomas P., are to be taken only as expressing the legal effect of the plea of justification. This is to be regarded as independent of the plea of denial, and taken alone, is an admission; but yet, when pleaded with the general denial, does not take away the necessity of the plaintiff first making out his case. This inconsistency of pleading was not allowed by the old common law, but was permitted by the statute, 5th Anne, and is believed to be held legitimate in all systems which allow several pleas in defence. 1 Chitty on Pleading. This was the practice in this State before the adoption of the Code, and it is not changed by that statute.

The case is very imperfectly prepared and presented in the record, so that we are unable to learn how it was viewed in the court below, upon some points suggested in the argument.

The judgment is reversed.

McMILLEN *et al.* v. BOYLES, County Judge.

The act entitled "an act legalizing the issue of county, city, and town corporation bonds in the counties of Lee and Davis," (Stat. of 1857, 447), is not unconstitutional.

The power to subscribe to the capital stock of railroad corporations, and to issue county bonds in payment of such subscriptions, having been conferred upon the counties, any defect in the exercise of the power, may be cured by the General Assembly of the State.

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99	509

6	304
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Appeal from the Lee District Court.

TUESDAY, JUNE 22.

BILL FOR AN INJUNCTION, TO ENJOIN THE RESPONDENTS FROM THE COLLECTION OF CERTAIN RAILROAD TAX. At a former date, the people of the county of Lee, voted upon the question of a subscription to each of three railway companies, to assist in constructing three railways in that county. The proceedings submitting the matter to a vote, were brought to this court for review, and were held invalid, principally upon the ground that three distinct and independent measures, were submitted together, upon such terms that each was made to depend upon the others, and neither could take effect, notwithstanding a favorable vote, unless the others were also carried. (See 3 Iowa, 311.) At the session of the legislature, commencing in December, 1856, an enabling or curative act was passed, legalizing the proceedings and vote, and healing the defect therein, (Stat. 1857, 447), under which the county officers of Lee county, were proceeding to collect the taxes authorized by said vote. A demurrer to the bill was sustained, and the complainants appeal.

F. Semple, for the appellants, contended that the original proceedings, under which the subscription to the railroads was voted, and the act passed by the general assembly, curing the defects in the proceedings, were unconstitutional and void, citing 1 Black. Com., 44; *City of Bridgeport v. Housatonic Railroad Co.*, 2 Am. Railroad Cases, 39; *Merrill v. Sherburn*, 1 N. H., 199.

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*J. M. Beck**, (with whom was *J. C. Hall*,) for the appellants.

The question as to the constitutional power of the counties of this State, to subscribe to the capital stock of railroads, has been definitely and finally settled by three decisions of this court. The case of the *Dubuque and Pacific Railroad Co. v. Dubuque County*, 4 G. Greene, 1, was decided by Judges Williams, Green and Kinney. *The State, ex rel. Leech v. Bissel*, 4 G. Greene, 328, was decided while Judge Hall was on the bench, and *Clapp v. Cedar County*, 5 Iowa, 15, by the present judges. It is decided in these cases, that by chap. 15 of the Code, sections 114, 115, 116, 117, 118, 119, the legislature, in discharge of its constitutional power, has authorized the counties to take stock in railroads, and issue their bonds in payment therefor. So many decisions of this court, concurred in by almost all the judges that have occupied the bench, undoubtedly has definitely and fully settled the questions involved.

The only point to be determined, in the case at bar, is conceived to be this: Is the law of the legislature, legalizing the bonds of Lee county, issued for railroad purposes, (Session Laws 1857, chap. 258, 447), valid and of force, and are its provisions sufficient to cure and remedy the defects in the proceedings of Lee county, in voting the subscription to said railroads, and issuing the bonds.

The legislature having the constitutional right to confer the power upon the counties to subscribe to railroads, and having conferred that power, in chapter 15 of the Code,

* If any apology is necessary for publishing in *extenso*, the able argument of J. M. Beck, Esq., the reporter trusts it will be found in the importance of the questions under discussion—in the reference to the authorities cited by him, by the court—and in the brevity with which the views of the court are expressed in the opinion. The argument of Mr. Sumner is not published, for the reason, that it was evidently not prepared for publication, and cited but few authorities. REPORTER.

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such subscription and issuing of bonds in payment thereof, on the part of Lee county, can only be considered invalid, on account of irregularity and non-compliance with the law, directing in what manner the power may, or can be exercised. These bonds cannot be considered void, because of want of power in the county to issue them. That power, this court has decided she possesses. *Olapp v. Cedar County*. If the bonds, then, are invalid, it is because the county, or more properly, the officers thereof, have not complied with the provisions of the law, and have not followed the directions therein given, for the exercise of the duties, and the discharge of the powers conferred. In *McMillan et al. v. Lee County et al.*, 3 Iowa, 313, this court construed the law to direct, that in case a proposition to subscribe to several railroads was submitted to the vote of the people, the subscription to each road should be a distinct and separate proposition, and not dependent on the others; and in a like manner, the question of a tax to pay the subscription to each road, should be an independent and distinct question. The proceedings in Lee county, were not in accordance with this construction of the law. The different subscriptions and the tax, were voted upon as one proposition. Lee county, in attempting to exercise a power conferred upon her by the legislature, failed to follow strictly the directions prescribed for the exercise of that power. Without the consent of the legislature, the power could not have been lawfully exercised. That being given, if the restrictions and conditions imposed, had been complied with, the act of the county would have been valid and binding.

The legislature, possessing the constitutional right to confer this power on the counties, undoubtedly could fix whatever restrictions upon the exercise of it, wisdom would seem to dictate. It could permit the exercise of it by the proper officers of the counties, without the vote of the people. 3 Grattan, 247; 8 Leigh, 120; 24 Wend., 64; 5 Gilman, 405. It could permit or forbid joint propositions to be submitted to one vote; and the manner and form of

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the exercise of the power is, evidently, governed only by legislative discretion and wisdom, and is entirely under the control of the law making power. If, then, the legislature could modify and change the manner and form of the proceedings before the vote, it could, most certainly, conform and ratify proceedings not strictly in accordance with the law governing them. To deny this, would strip the legislature of its plenary power of legislation. There are many cases in point, fully sustaining this position, a few of which only I will quote. *Cowgill et al. v. Long*, 15 Ill., 203. The statute of Illinois authorized the inhabitants of any school district, to vote a tax for the purpose of building school houses, "on any Saturday of May or June." On Saturday, the 20th of July, a tax was voted for that purpose. Plaintiffs were charged with an amount of tax, and their property distrained to pay the same. They thereupon, filed their bill in chancery to enjoin the selling of the property. While this suit was pending, the legislature passed a special act, legalizing the vote of the inhabitants of said school district, in levying said tax, and declaring the same "good, valid and effectual in law and equity." The court held, that under the law existing at the time of the vote, the tax was illegally levied, and invalid, but that the act of the legislature legalizing said vote, and curing the defects therein, was effectual for that purpose, and that the legislature, without any doubt, had authority to enact the law.

The courts have uniformly held that, in cases where the legislature has authority to prescribe the form and manner of particular proceedings, the departure from the direction of the law, may be confirmed by a subsequent act of the legislature, and be made valid and legal. Defects in the levy of an execution, may be cured by subsequent statute. *Beach v. Walker*, 6 Conn., 190; *Booth v. Booth*, 7 Conn., 350. So, a statute may confirm a judgment, and cure defects therein. *Underwood v. Lilly*, 10 Serg. & Rawle, 97. A sale of land made in good faith, by an executor, without authority of law, may be confirmed, and

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the title thereto rendered valid, by especial legislative enactment. *Wilkinson v. Leland*, 2 Peters, 627. So, a statute may cure defects in a sheriff's deed. *Menges v. Wertman*, 1 Penna. State Reports, 218. A statute may cure defects in the form of acknowledgments of deeds. *Chestnut v. Shane*, 16 Ohio, 599; *Barnett v. Barnett*, 15 Serg. & Rawle, 72; *Tate v. Stoolzfoss*, 16 Ib., 35; *Watson v. Mercer*, 8 Peters, 88. In all of these cases, the legislature had prescribed rules of proceedings which were of general application. The law fixed the manner of a levy of an execution—the proceedings in causes prosecuted to judgment—the proceedings necessary to render valid executors's sale of lands—the form and requisites of sheriff's deeds, and the form and manner of acknowledgments of conveyances. The requirements of the law, in none of these cases, were complied with, but the courts held that it was competent for the legislature to render valid such proceedings, and cure such defects and irregularities, by subsequent legislation.

The case of *The City of Bridgeport v. Housatonic Railroad Company*, 15 Conn., 475, is in point. The plaintiff (City of Bridgeport,) subscribed to the stock of the Housatonic Railroad Company, without any authority for such subscription in her charter. Afterwards, the legislature "ratified, confirmed and established, and made obligatory" upon said city, said subscription; provided, however, that the confirmatory law, or resolution, should not take effect until the same was submitted to, and approved by the free-men of the city. The court held, that the legislative ratification of the subscription, rendered it valid and binding. The fact, that the law required the express consent of the city, before it should take effect, cannot change the force of the decision, in its application to the case at bar. There was no more necessity for the submission of this law, in order to give it force, to the approval of the people, than for a like popular ratification of any other statute. The power conceded to legislate, with the express consent of the people given in that way, admits the power to legis-

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late without it. The force of the law was not obtained by this submission to the people; it flowed from the inherent power of the legislature. The courts will always presume consent of those affected by legislative acts, if it is necessary to sustain them. In *Wellington et al., petitioners*, 16 Pick., 95, Chief Justice Shaw, lays down this explicit rule: "If an act of the legislature appears on the face of it, to be an encroachment on the rights of any person, but would, nevertheless, be valid, if passed with the consent of those persons, the court is bound to presume such consent was given."

The consent of the people of Lee county, must be presumed by this court, to have been given to the ratification, by the legislature, of their acts in question. The case at bar, then, differs as to the consent of those concerned, in no respect from the case last quoted, and in other respects, would seem to require, with greater force, the application of the doctrine contended for. The city of Bridgeport voted and made the subscription, without authority of law; the county of Lee had full authority, under the law of the State, to subscribe to the stock of the railroads, and issue her bonds thereon, but in so doing failed to follow the directions of the statute. Assuredly, the same principles of law that would authorize the legalizing of the proceedings of the city of Bridgeport, would apply with greater force to the law curing defects in, and making valid the solemn contracts of Lee county.

It is a well recognized principal of law, and it is of universal application, that in all cases where power must be conferred to render the performance of a particular act valid and binding, such act, done without authority, may be so ratified and confirmed, that it will have all the force and effect a prior conferred power would have given it. To this rule there can be no exception. The question may arise, from what source this ratification shall come—whether from the original possessor of the power, or the the party affected by the exercise of it, or from both. In the case now before the court, there can be no difficulty on

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that point, for the ratification necessary to the validity of the acts and proceedings claimed to be void, has been had from all sources: from the legislature, the source of the power, by the statute in question; from the people of the county, by their presumed consent—in accordance with the doctrine of Chief Justice Shaw, above quoted; and from the representatives and officials of the county, by their acquiescing in, and acting under it.

Upon these principles, sustained by the authorities above quoted, I conclude the confirmatory act of January 29, 1857, legalizing the bonds of Lee county, is a legitimate and proper exercise of legislative power, and by that act, the bonds are made valid and binding.

By the constitution of Iowa, (in force at the date of the statute in question), supreme legislative authority was conferred upon the general assembly, subject only to the restrictions and reservations contained in that instrument. It was not a grant of power, but a restriction thereon. The legislature could, therefore, exercise all powers not forbidden by the constitution of the State, or delegated to the general government, or prohibited by the constitution of the United States. These were the only limits upon the power of the legislature. 1 Kent Com., (marg. page), 448, 9; *Sawyer v. The City of Alton*, 3 Scam., 130; *People v. Toynbee*, 2 Parker, C. R. (N. Y.), 490; *Cochran v. Van Surly*, 20 Wend., 382. The people, in their wisdom and power, established the constitution as the paramount and supreme law of the land. In it, our free and republican institutions are perpetuated—our liberties are guarded with care, and all the individual rights of persons and property, consistent with the public welfare, are jealously preserved; but no other restrictions are placed upon the law-making power. All laws, therefore, that are not forbidden by the constitution of the State, or of the United States, are of force and effect, and are to be so recognized, and as such, enforced by the judiciary branch of the government. Their wisdom and justice is not to be inquired into; their policy and expediency is not a subject of inquiry by the

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department of government called upon to interpret and enforce them. If found consistent with the plain provisions of the constitution, they are to be enforced, without applying any other test. *Hamilton v. St. Louis County Court*, 15 Mo., 4; *Sharpless v. Mayor of Philadelphia*, 21 Penn. State, 147.

In *Cochran v. Van Surly*, 20 Wend., 382; it is said: "It is difficult upon any general principles, to limit the omnipotence of the sovereign legislative power by judicial interpretation, except so far as the express words of a written constitution gives that authority. There are, indeed, many dicta, and some authorities, holding that acts contrary to the first principles of right, are void. The principle is unquestionably sound as the governing rule of a legislature in relation to its own acts, or even in relation to a preceding legislature. It also offers a safe rule of construction for courts, in the interpretation of laws admitting of doubtful construction, to presume the legislature could not have intended an unequal or unjust operation of its statutes. Such construction ought never to be given to legislative language, if it be susceptible of any other, more conformable to justice; but if the words be positive, and without ambiguity, I can find no authority for a court to vacate or repeal a statute on that ground. But it is only in express constitutional provisions, limiting legislative power, and controlling the temporary will of a majority, by a permanent and paramount law, settled [by the deliberative wisdom of a nation, that I can find safe and solid ground for the authority of courts of justice to declare void any legislative enactment. Any assumption of authority beyond this, would be to place in the hands of the judiciary, power too great and too undefined, either for its own security or the protection of private rights." The legislature of Iowa, being possessed of supreme legislative authority, restricted only by the constitution of the State, and the United States, could pass all laws not inconsistent with either.

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The only point, then, in this case, to be decided by this court, is this: Is the statute in question within the restrictions imposed upon the legislative power of the State?

Before noticing the constitutional objections to the statute, it will be well to consider the principles and rules that should govern the court, in exercising its power of annulling, by its decisions, the acts of the law-making department of the government. That this court possesses the power, is not denied; and none other possessed by it is to be more cautiously and considerately exercised. If exercised within the rules and principles prescribed and recognized by the numerous authorities in point, it is an ark of safety for the rights of the people. But if arbitrarily enforced—based upon the views or reasoning of the court on questions of policy, justice or right—it would have a tendency to subvert the very principles of our government. The power of courts to interpret and construe laws, does not carry with it a power to annul them. And it would be dangerous indeed, for courts in the exercise of their power of interpretation, to disregard the plain language of law, and by construction, to bring it within constitutional restrictions, thereby rendering it of effect. It would be equally dangerous for courts, by the construction of the constitution, to make its restrictions applicable to laws not within the plain language of the instrument.

Chief Justice Marshall, in *Fletcher v. Peck*, 6 Cranch, 37, says: "The question whether a law be void for its repugnance to the constitution, is at all times a question of much delicacy, which ought seldom, if ever, be decided in the affirmative, in a doubtful case." "It is not on slight implication, and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The question between the constitution and the law should be such, that the judge feels a clear and strong conviction of their incompatibility with each other." Justice Washington, in *Cooper v. Telfair*, 4 Dallas, 14, says: "The presumption, indeed,

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must always be in favor of the validity of laws, unless the contrary is clearly demonstrated." The same eminent judge observes, in *Ogden v. Saunders*, 12 Wheaton, 270: "It is but a decent respect due to the wisdom, the integrity and the patriotism of a legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt. This has always been the language of this court, when that subject has called for its decision; and I know that it expresses the honest sentiment of each and ever member of this bench." Judge Blackford, in *The State v. Cooper*, 5 Blackford, 259, says: "In questions of this kind, (the constitutionality of a law), it is our duty to decide in favor of the validity of the statute, unless its constitutionality is so obvious as to admit of no doubt. Chief Justice Shaw, in *Wellington et al., petitioners*, 16 Pick., 95, after admitting that, in a proper case, the courts may declare an act unconstitutional and inoperative, uses the following language: "Perhaps, however, it may be well doubted, whether a formal act of the legislature, can ever, with strict legal propriety, be said to be void; it seems more consistent with the nature of the subject, and to the principles applicable to analogous cases, to treat it voidable." "If a legislative act may, or may not, be void, according to circumstances, courts are bound by the plainest principles of exposition, as well as by just deference to the legislature, to presume the existence of those circumstances which will support it and give it validity."

The uniform doctrine of the courts is, that a law will not be pronounced unconstitutional and void, unless it clearly and palpably conflicts with the constitution; and of this there must be no doubt in the mind of the judge. In the different decisions of the courts, this doctrine is announced in various words, but in all with equal force, conveying the same idea. In *Santo et al. v. The State of Iowa*, 2 Iowa, 208, it is held that the court will not pronounce a law unconstitutional, "unless the case be clear, decisive and unavoidable." See *Lane v. Drummond*, 3

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Scam., 240; *People v. Foote*, 19 Johnson, 58. At least one hundred other cases of the same purport, could be cited. To authorize a court to pronounce a law void, in accordance with the doctrine of these authorities, it must conflict with express provisions of the constitution. It will not do to put a forced construction on, or draw an inference from, that instrument, and by that means condemn an act of the legislature.

I will proceed to notice the points made by the attorney for plaintiffs, to establish his position that the law in question is unconstitutional and void. He relies upon sections 1, 6, 9, 18, 21 and 24 of the Bill of Rights, and article 8, section 26 of the constitution, and strenuously contends that the law in controversy conflicts with them. Section 1 insures the right of acquiring, possessing and protecting property; and section 8 provides that, "private property shall not be taken for public use, without just compensation." It is gravely contended by the solicitor for plaintiffs, that the statute in question violates these constitutional guarantees.

I confess that I want the powers of imagination to enable me to see how, in the least degree, this statute interferes with, or abridges, the right of "acquiring, possessing and protecting property," or in any way subjects property to be taken for the public use. It authorizes no proceedings, and licenses no man to interfere with the lands or goods of another. The petitioners have the same rights of property, and the same security in the possession thereof, since the enactment of this law as before. Not one cent in value of their property can, by virtue of the law, be taken from them. But it is contended, the law will authorize the levying a tax to pay the bonds, and taxation is identical with the taking of property for public use, and with interfering with the right to "acquire, possess, and protect" it. If this be true, then, indeed, is the constitution constantly violated and disregarded. Every tax levied within the State, violates these provisions of the bill of rights. There can be no distinction in favor of any

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tax. Those for ordinary State and county revenue, as well as those special taxes for building bridges, jails, poor-houses and railroads, must not again be levied, if this doctrine be correct; and hereafter we will present to the world the gratifying spectacle of a State existing without taxes and without a revenue.

Happy thought, but unfortunately for the tax-ridden people, that it is so lately conceived. This court, if the argument be sound, violated the constitution in *Clapp v. Cedar County*, by deciding, that under chapter 15 of the Code, the counties could subscribe to railroads, and levy taxes to pay such subscription. But, in the event of that decision being law, notwithstanding this recent constitutional discovery, I would respectfully inquire, what distinctions exist that makes it constitutional for the legislature, in chapter fifteen of the Code, to authorize taxes to be raised for building railroads, and renders the same thing unconstitutional in chapter 258 of the session laws of 1857?

The sixth section of the bill of rights, is relied upon as prohibiting the law in question. It provides, "that all laws of a general nature, shall have a uniform operation," and the solicitor for plaintiffs contends, that because the law is applicable to Davis and Lee counties only, it is obnoxious to this provision. In the first place, it is not a general law, for it is confined to Davis and Lee counties, and therefore local; in the second place, it is uniform in all its operations, for it cures defects in all votes, and legalizes all bonds of said counties, precisely in the same way. The gentleman complains that, by the operation of this law, the people of Lee county are taxed, while the people of Van Buren are exempt from such taxation. By virtue of law, the people of Lee county pay a tax for the purpose of building a poor-house. No such tax is paid in Van Buren. Is the law authorizing the levying of the tax in Lee, therefore, void? Are city charters, under which taxes are levied void, because all the people of the State are not subjected thereto? Are all special acts of the legislature forbidden by this section of the bill of rights? If

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the solicitor's argument be true, the court must decide these questions affirmatively.

With equal seriousness, it is earnestly argued, that the law is in conflict with section nine, of the bill of rights, which secures the right of trial by jury. It is said, that if this law be sustained, "under color of taxation," private property will be taken without trial by jury. Now, this taking of "private property under color of taxation," by the effect of this law, or more properly as a consequence thereof, which seems so terrible to plaintiff's solicitor, is nothing more than the levying and collecting of taxes in the ordinary way. It is gravely contended, that the right of trial by jury, interferes with the taxing power, as it is now exercised. If the solicitor's position be correct, before any tax can be levied by the proper authorities, for the building of school houses, bridges, poor-houses, and to pay the ordinary expenses of the state and county, as well as for the building of railroads, a jury must intervene—a trial be had, and after verdict, the tax may only be levied. It would seem proper, and, in fact, obligatory upon the gentleman, as the discoverer of this principle of constitutional law, to enlighten the court and the country, by detailed directions as to the proper proceedings to be had, in order that these taxes may be sanctioned by the verdict of a jury; and in case he finds no proper directions to exist in the Code on the subject, he would, certainly, confer a favor upon the people, by submitting proper suggestions and directions for the consideration of the legislature, that a constitutional law may be passed on that subject.

Section 21 of the bill of rights, is next quoted by the solicitor for plaintiffs, and relied upon as invalidating the act of the legislature in question. Here, the gentleman proves, indeed, that in addition to his capacity to delve into the profound depths of constitutional law, and bring to the gaze of admiring courts, new, and before unknown doctrines and principles of construction, he can be, in dealing with these grave constitutional questions, extremely funny. The gentleman's argument, very slightly abrevi-

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ated, and almost in his own words, is this: The section 21 of the bill of rights, and article 1, sec. 10, of the constitution of the United States, provide that the legislature shall pass no law impairing the obligation of contracts; the relation of sovereignty and subject, is an express contract—the government is the sovereign—the people, the subjects. In our State, it is not a parol, but a written contract, (a deed, I suppose he might have called it, since seals are abolished in Iowa,) and is embodied in the constitution. Now, “the government of Iowa contracted” in the constitution, “with us expressly, to protect us in the enjoyment of property;” this law “slips in and puts a man’s property in jeopardy,” and “taxes him:” therefore, the statute in question, “impairs the obligations of contracts,” and is, consequently, unconstitutional and void.

I will submit to the gentleman that, according to his understanding and interpretation of the constitution and laws generally, while it may be doubtful whether he has made out a clear case against the “Government of Iowa,” for “impairing the obligations of contracts,” he may consider that he has, indeed, made a strong case for the violation of a contract by the said “Government of Iowa.” According to his showing, the said “Government of Iowa” contracted with his clients, to protect them, &c., but has failed so to do, whereby they have suffered damage; a clear cause of action. The gentleman, doubtless, among his other constitutional discoveries, will find a proper form of action against the aforesaid “Government of Iowa,” and a proper court in which to bring it, whereby he may obtain redress for the grievances of his clients. The court ought to be thankful to the gentleman, for entertaining them in the discharge of the grave and onerous duties of the bench, with a constitutional disquisition so very amusing.

Section 24 of the bill of rights, is next quoted by the gentleman, and in it he sees absolute prohibition to the exercise of any powers by the legislature, except those expressly mentioned in, and conferred by the constitution.

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Here, again, is another most important discovery in the science of constitutional law. If the gentleman's argument and position be true, our poor constitution is, indeed, a much abused and often violated instrument. Not one law has been passed by the legislature, that is not in conflict with it; nor, in fact, can the legislature pass laws on any subject. Article 3 of the constitution, defines the powers of the general assembly. In that article, and in fact, in the whole instrument, express power to legislate on any particular subject, is not given. The legislature is prohibited from passing laws on several subjects, but no express permission is given to legislate on any specified subject. If the gentleman's construction of this question be true, every law now on our statute book, is unconstitutional.

I have, heretofore, noticed pretty fully, the power of the legislature. I will but call attention to article 3, sec. 1 of the constitution, which provides that the legislative authority of this State, shall be vested in the general assembly. The legislative authority, conferred on the general assembly, is only limited by the restrictions in the constitution; this branch of government, is the supreme power in the State, (1 Kent's Com., marg. p., 221), to which the people have confided power, not reserved in themselves. The legislature, therefore, has power to pass all laws not expressly forbidden by the constitution of the State, or of the United States.

The gentleman finds another constitutional objection in article 3, sec. 26, which, as all others relied on so confidently by him, is argued to be clearly and positively fatal to the validity of the law. Was ever a law so utterly void. Was ever a legislature so rebellious to the supreme will of the people prescribed in the constitution. Here is one little law, that violates seven distinct provisions of the fundamental and paramount law of the land. The legislature, in the exercise of what was humbly conceived to be an attribute of supreme legislative power, enacts this brief statute, when the solicitor for plaintiffs appears in all the ter-

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rors of the avenger of an outraged people, and holding in his hand these seven constitutional objections—corresponding with the seven plagues, and the seven vials of wrath, mentioned in the Apocalypse—pours them all, in one exterminating torrent, on the head of the offending general assembly, and sweeps away forever, the rebellious work of its hands.

This section (article 8, sec. 26,) provides that “every law shall embrace but one object, which shall be expressed in the title.” The solicitor does not pretend that this is applicable to the confirmatory act in question, but to the proceedings and vote of the people, in authorizing the subscription to the railroads. Now, this prohibition applies, evidently, to the acts of the legislature, and nothing else; and who ever heard an order, judgment, decree, or proceedings of the county court, or a vote of the people, called a law? The argument is simply absurd. In *McMillan et al. v. Boyles, Judge, &c.*, 3 Iowa, 322, it is said the spirit of this provision applies to these proceedings of the county, but that it does not, in its letter, have any application to them; that the power exercised by the county, being a qualified kind of legislation, to be exercised strictly under direction of the statute; and that there being no provisions for connecting two questions in one submission, nor for the imposing of any condition, whereby a proposition adopted by a majority of votes, shall be defeated, the court argues, that under the strictness of construction, this qualified legislation must be held, in every single exercise thereof, to a proposition having one object. Section 119 of the Code provides, that a vote of the people upon propositions to borrow money, &c., and “the entry thereof on the county records, shall have the force and effect of a law of the general assembly.” It will be remarked, that the vote and record is not, by this provision, brought within the restrictions imposed upon laws of the general assembly—they are only affected so far as their “force and effect” are concerned, and no farther. But

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suppose by this section of the Code, they were brought within the constitutional restriction governing laws, it is but a legislative act that gives them such character, which can, as all other laws, be repealed and modified, or its operation suspended, at the will of the general assembly. The act legalizing the bonds of Lee county, by curing all defects arising from a non-compliance with law, is a simple exercise of the conceded power of the legislature to annul, repeal and suspend existing laws, and to alter, modify or abolish proceedings before any or all courts and authorities in the State. But this court, in *The State of Iowa, ex rel. Weir v. The County Judge of Davis County*, 2 Iowa, 281, held, that a law establishing forty-six roads, was not obnoxious to this clause of the constitution. It would seem, that if it be competent for the legislature, by one single law, to give legal existence to forty-six roads, it is also within the power of the county, if she is governed by the same constitutional restrictions, to give her aid by one *quasi* law, to the construction of three railroads.

It is objected to the law in question, that it is retrospective; and while the solicitor of plaintiffs does not entirely deny the right of the legislature to enact laws of that character, he argues, that the act in question, on account of its manifest injustice, is void. He says, "when they (retrospective statutes) conflict with any constitutional provision, or disturb vested rights, or are manifestly unjust, they must fall." We will not contend that retrospective statutes, or any other statutes that conflict with constitutional provisions, are valid. A statute, whatever be its other characteristics, if it is unconstitutional, is certainly void; that much of the gentleman's proposition is true. But he says, if a retrospective statute "disturbs vested rights, or is manifestly unjust, it must fall." I will beg to introduce a few authorities, of the very many upon my brief, which very explicitly and very pointedly announce an entirely different doctrine.

The supreme court of the United States, in *Baltimore and Susquehanna Railroad Company v. Nesbit*, 10 How-

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ard, 401, says: "That there exists a general power in the state government to enact retrospective or retroactive laws, is a point too well settled to admit of question at this day. The only limit upon this power in the States, by the federal constitution, and, therefore, the only source of cognizance, or control with respect to that power existing in this court, is the provision that these retrospective laws shall not be such as are technically *ex post facto*, or such as impair the obligation of contracts." In *Watson et al. v. Mercer*, 8 Peters, 110, the same court says: "It is clear, that this court has no right to pronounce an act of the state legislature void, as contrary to the constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The constitution of the United States does not prohibit the States from passing retrospective laws generally, but only *ex post facto* laws." The same doctrine is announced by the same court, in *Calder v. Bull*, 3 Dallas, 385; *Fletcher v. Peck*, 6 Cranch, 138; *Ogden v. Saunders*, 12 Wheaton, 266; *Satterlee v. Mathewson*, 2 Peters, 380, and *Charleston River Bridge v. Warren Bridge*, 11 Peters, 420. Retrospective laws, then, and those divesting vested rights, are not in conflict with the constitution of the United States; to this doctrine there is no exception against those statutes which are manifestly unjust. These authorities explicitly declare, that the States may pass such laws, providing, of course, the particular State constitutions do not prohibit them. Let us compare the provisions of the constitution of the United States with the constitution of Iowa, in force when the law in controversy was enacted. The constitution of the United States provides, article 1, section 10, "No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." The constitution of Iowa, bill of rights, section 21, says: "No bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, shall ever be passed." It will be observed that the provisions are identical. Now, if the constitution of the United States does not forbid laws divesting vested

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rights, and retrospective laws—even those that are “manifestly unjust”—neither does the constitution of our State. In all the States, where retrospective laws are not expressly forbidden by the State constitutions, they are held to be valid. In Maryland, it has been decided, in *Baughner v. Nelson*, 9 Gill, 300: “That the prohibition in the constitution, against the passing of *ex post facto* laws, recognizes the right of the legislature to pass retrospective laws.’ In Ohio, such laws are constitutional. *Chestnut v. Shane*, 16 Ohio, 599. So in Georgia. *Searcy v. Stubbs*, 12 Ga., 437; and in Pennsylvania. *Underwood v. Lilly*, 10 Serg. & Rawle, 97; *Tate et al. v. Stooltzfoots*, 16 Ib., 35; *Bleakney et al. v. Farmers and M. Bank*, 17 Ib., 64; *Hepburn v. Curts*, 7 Watts, 300. See also *Raverty and Wife v. Fridge*, 8 McLean, 220. It is quite unnecessary to quote any more of the numerous authorities from the different States, which I find upon my brief. The foregoing are certainly sufficient to establish the point. The power of their respective legislatures to pass retrospective laws, has been recognized in all of the state courts, except those where it is expressly prohibited by state constitutions. So far as I have been able to investigate the question, such prohibition exists only in New Hampshire and Tennessee. As an authority against the law in question, the solicitor for plaintiffs, quotes *Merrell v. Sherburn*, 1 N. H., 199. The 23d article, of the bill of rights of that State, provides as follows: “Retrospective laws are highly injurious, oppressive and unjust; no such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offences.” So in Tennessee, retrospective laws are held by the courts to be void: 1 Yerg., 360; 5 Ib., 320. But section 20 of the declaration of rights of that State provides—“That no retrospective law, or law impairing the obligation of contracts, shall be made.”

It is claimed, that the act in question, overthrows and annuls the decisions of this court; that it makes valid what this court has pronounced void, and therefore, conflicts

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with, and disregards the judgment of this, the highest judicial tribunal of the State. It is apparent that this law, is not only not in conflict with the decision of the court, nor an attempt to annul it, but that it recognized such decision, after its rendition, as the law of the land; for that reason, was the law passed. The decision being the law of the state, governing the rights and liabilities of parties concerned, the general assembly conceived that policy, justice and wisdom, required the existence of a different rule, and in the exercise of the supreme legislative power, and acting within the limits of that power, as I humbly conceive I have shown in this argument, the law in question was passed. It would be assuming, indeed, unheard of power, for this court, and dangerous too, in the extreme, to claim that the law, as announced by this court is, like those of the Medes and Persians, irrepealable by the supreme legislative power.

It is said that this court having held, in *McMillan et al. v. Boyles, County Judge, &c.*, that the vote, subscription, &c., of Lee county, were void, the legislature cannot make valid such void transactions. While I am warranted in presuming that the word *void*, as used by the court, in the opinion in that case, was a slip of the pen, and not intended to be understood in its legal acceptation, it is clear, upon principle, and from the authorities, that the legislature may make valid and binding, void contracts and transactions. See *Wilkinson v. Leland*, 2 Peters, 661; *Satterlee v. Mathewson*, 2 Peters, 412; *Watson v. Mercer*, 8 Peters, 108; *Cowgill v. Long*, 15 Ill., 203; *Menges v. Wertman*, 1 Penn. State R., 218. These authorities, with others upon my brief, are precisely in point, but the length this argument has already attained, admonishes me not to comment upon, or make extracts from them.

It is also claimed that the statute confirmatory of the proceedings in Lee county, is an encroachment upon the peculiar powers of this court, and instead of being a law, is a legislative sentence. Admitting this act of the legislature to be precisely what the gentleman terms it, "a leg-

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islative sentence," it would still be valid, if the authorities referred to be relied upon as law. But it is not fair or honest in the affairs of life, to destroy the good reputation of a fellow-being, by giving him a bad name, unless he justly deserves it. Neither is it admissible for the solicitor of plaintiffs, to apply to the law in question a term of odium, and thereby seek to overthrow it. This law is not a "legislative sentence;" it is a statute confirming and curing defects in past transactions and acts, permitted by law to be done, but not performed in conformity with law. Such laws have been uniformly sustained by the courts. The authorities which I have quoted on this point, are not required to be sustained by others, to prove that this kind of legislation is constitutional.

The fact that the law was passed while a cause was pending in the courts of the State, upon the subject matter operated upon by it, does not affect its validity. The power of the legislature is not dependant upon any circumstance of that character. It was just as competent for the general assembly to legislate upon that subject, while an action was pending, as before its commencement, or after its determination.

It will be seen, that the law sustained in *Cowgill v. Long*, 15 Ill., 203, was passed during the pendency of an action which was defeated by it. So, in *Underwood v. Lilly*, 10 Serg. & Rawle, 97. *Taggart v. McGinn*, 14 Penn. State R., (2 Harris), 155, was an action of covenant for ground rent. Judgment was had upon a reference to arbitrators, and a rule granted to show cause why the award should not be set aside. Among other reasons filed on the rule, why the judgment should be set aside, was this one: The award was illegal, because there was no cause of action in covenant. The rule was discharged, December 28, 1849, and a writ of error filed, January 14, 1850. At the session of the legislature in 1850, an act was passed, providing "that in all cases now pending, or hereafter to be brought in courts of record of this commonwealth, to enforce the payment of ground rent due and

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owing, the plaintiffs shall have a full and complete remedy thereof by action of covenant." The court affirmed the judgment in the case, and pronounced the law "a constitutional and beneficial statute." *Hepburn v. Curtis*, 8 Watts, 300, is a case of precisely the same character. Suit was brought in assumpsit by one firm against another. Judgment for defendant, because Hepburn was a member of both firms. Plaintiff thereupon took out his writ of error. Before the decision of the case in the supreme court, and after the trial in the court below, the legislature passed a law providing that "no action now pending on writ of error or otherwise, or hereafter to be brought by partners against partners, shall abate, or be defeated by, reason of one or more individuals being, or having been, members of both firms," &c. The supreme court sustained the law as applicable to the case, and remanded it for trial. It cannot be shown on principle, that laws operating upon cases that are in litigation, are more obnoxious to constitutional restrictions and justice, than those laws which are applicable only to those cases which have not been adjudicated by the courts. In the cases above quoted, all of which are equally as strong as the case at bar, the courts held that the different statutes, which received their approbation, did not conflict with constitutional provisions, or, in the least degree, interfere with their power. Neither was it considered, that by any of these statutes, the legislatures attempted to exercise judicial power. And the legislatures have gone still farther, without being considered by the courts as assuming their peculiar judicial powers. The courts of many States have decided, that it is competent for the legislature, by law, to open final judgments, and permit defeated parties to have new trials. Such is the decision in *Bradlee v. Brownfield*, 2 Watts & Serg., 271; and my recollection is, that like decisions have been made in Vermont, Maine, Connecticut, and probably Massachusetts. It will be remarked that the case at bar, was commenced after the passage of the confirmatory law in question.

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In his discussion of the objection to the law, that it is an assumption by the general assembly of judicial power, the solicitor for plaintiffs remarks: "Courts are by far the most important branch of government. On their action depends the peace and repose of society, and the sacred rights of property." While I claim to vie with the gentleman in respect for the judiciary department of government, I must be permitted to suggest, that perhaps in this, as in many other cases, comparisons are highly invidious, and do not serve to elucidate the points in controversy. However, I presume, that as an *argumentum ad hominem*, it will have the weight with the court to which it is properly entitled.

It is undoubtedly a safe rule, and one which was adopted by this court, in *The State of Iowa, ex rel. Weir v. The County Judge of Davis County*, 2 Iowa, 280, viz: that the constant exercise of power by the general assembly, is conclusive evidence of its rightful possession by that body. See, also, *State v. Mayhew*, 2 Gill, 487. Now, since the adoption of the constitution, the legislature has, at every session, adopted laws differing in character, in no essential, from the confirmatory act in question. Laws have been passed legalizing the acts of justices of the peace, county commissioners, probate judges, notaries public, and other officers—confirming and making valid elections, acts of persons and corporations, assessments and taxes levied by counties and school districts, &c., &c. These acts have not been rare—they are found in every volume of the session laws, and the power of the legislature to enact them, has never been doubted. Rights have accrued under them, and no doubt large interests are preserved or affected by them, but it has never been discovered that they are unconstitutional and void. It remained for the plaintiffs' solicitor, with his "seven constitutional objections," to sweep them from the statute books. The authority of the legislature to pass the law in question, flows from its inherent taxing power, which is essential to the existence of the State. This power is limit-

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ed only by the constitution, and the wisdom of the general assembly, and is restricted neither as to the character, amount, nor object of the tax. It may raise revenue for the ordinary expenses of the State, for education, improvements, or any object not forbidden in the constitution. In *Charles River Bridge v. Warren Bridge*, 11 Peters, 577, Justice McLean says: "That a State may appropriate private property to public use, is universally admitted. This power is incident to sovereignty, and there are no restrictions to its exercise, except such as may be imposed by the sovereignty itself. It may tax at its discretion, and adapt its policy to the wants of its citizens, and use their means for the promotion of its objects under its own laws." This power may be exercised by the general assembly in special and local acts, whenever taxes are required to be raised for proper objects. And I know of no authority vested in the courts, to determine when, and to what extent it may be exercised. *Shaw v. Dennis*, 5 Gillman, 405, is a case in point. In 1847, the legislature passed an act to authorize the levying of a special tax upon the owners of property in Rockford precinct, for the purpose of maintaining a certain bridge which had been previously erected, and constituted defendants bridge commissioners, to carry out the provisions of the act; in enforcing the collection of the tax levied, the property of plaintiff was taken, for which he brought his action of trespass. Judgment was rendered in the circuit court against defendants. On appeal to the supreme court, it was held that the law under which the tax was levied, was a constitutional exercise of the legislative taxing power. The learned judge who delivered the opinion of the court, said: "It will hardly be denied that the legislature has the right to impose a local tax upon a town or city, a precinct or county, for some local improvement, as the erection of a bridge or the repair of a road. In doing this, to be sure, it cannot say that one man shall pay all, and the others none, or that one shall pay one dollar, and another ten, for the tax must be uni-

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form, and upon the value of the property which each one has, so that the burthen presses alike upon the whole community.” “But the legislature must necessarily have the right to say, how large that community thus subject to the tax shall be, whether a city or one of its wards, or a precinct, a county, or the whole State. If the legislature had the right to impose this tax to build a bridge, it would be equally lawful to purchase one, or to pay for one already constructed for the public accommodation.” See *Thomas v. Leland*, 24 Wend., 65, which is much stronger than the case just quoted. There, the court held an act of the legislature to be constitutional and valid, which imposed a tax on the city of Utica to pay \$38,615, for which certain citizens had given their bond, in order to secure the termination of a canal at that place. The contract of the citizens to secure the termination of the canal, as well as the act of the legislature, was without the consent or formal ratification of the people of the city. It may also be observed, that in the case of *Shaw v. Dennise*, the people taxed did not consent expressly to the law taxing them, nor were they parties to any contract binding them to pay for the bridge.

These cases, as well as many others that I have quoted, are very much stronger than the one at bar. The people of Lee county have consented to pay the tax which is forbidden by the injunction in this cause—nay, I may say, they now desire to pay it. The law in question, curing formal defects in the manner in which their consent and wishes were expressed, has made obligatory and binding the acts and proceedings, which the people honestly intended should be so from the first. It removed technical objections to their acts, done in good faith, for the express purpose of levying a tax on themselves. Will this court, disregarding the precedents cited, compel them not to do, what they desire, and are willing to do? The confirmatory law in question, being, as I humbly conceive, a legitimate exercise of the constitutional power of the general assembly, is eminently just and proper, in aiding the

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people to carry out their solemnly expressed wishes. And what power in the State can stand between the people and their wishes? The general assembly, constituted of the immediate representatives of the people, is not more strongly bound by the genius of our free and democratic institutions, to obey the popular will, than is this court, when that will is expressed by legislative acts, in accordance with the constitution.

WOODWARD, J.—The question now made is, whether the legislature could, by the act of 1857, cure the evils existing in the former submission to, and vote by, the people of Lee county. The argument of the counsel of appellants, strikes at the fundamental, constitutional power of the legislature, to confer upon the counties the authority to subscribe to railway companies, and for similar internal improvements. We understand this question to have been settled, in the case of *Clapp v. The County of Cedar*, 5 Iowa, 15, in which the majority of the present court, felt themselves constrained to admit the power, upon the force of two previous judicial decisions, and several acts of legislation, in which it had been distinctly recognized.

The power having been conferred, then, can the general assembly cure any defects in the exercise of it? Upon this question, we cannot entertain a doubt. If this exercise of the authority were held to be unconstitutional—if the former decision of this court upon this case, had been based upon such grounds—then it would follow, that the legislature could not render the case valid. But, inasmuch as that body can confer the authority, and has conferred it, we conceive that the same body may remedy a defect in the exercise of it. Without taking the time to examine the cases, we refer to those cited in the argument of respondent. Neither does the pressing business of the court, permit a detailed notice of the arguments of petitioners, drawn from a supposed conflict with the constitution, although much might be said in relation thereto.

The wisdom of the legislation, here called in question,

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it is not our province to comment upon, but only the capacity for its exercise. And we cannot doubt, but that the power which can confer an authority, and prescribe the manner of its use, may change the mode, or cure its defects. There are, undoubtedly, restrictions to the exercise of this power, but they are not brought into view, in the present case.

The judgment of the court below should be affirmed.

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The fact that the treasurer of a county made a mistake, and deceived the agent of the owner, in representing that certain land was not assessed, and that no taxes were to be paid on it for a given year, cannot avail the owner, in a proceeding to set aside a decree of foreclosure against the land, under a tax deed, for the taxes of that year, unless some collusion or fraudulent combination be shown between the treasurer and the purchaser of the land.

Nor can the fact, that the land was assessed in the name of a wrong person, or that the owner, since the sale of the land for taxes, has paid the subsequent taxes on the same, avail to set aside a decree of foreclosure under a tax deed.

In cases where there is no personal service on the defendant, and he is served by publication, the mailing of a copy of the petition and notice to the defendant, as required by section 1826 of the Code, is an essential part of the service, the proof of which, or in excuse of which, should appear of record in the case; and the record should further show that such proof had been made, before a default was entered against the defendant.

The property of one person cannot be divested, and vested in another, in an *ex parte* proceeding, unless the record in the cause, shows that section 1826 of the Code was strictly complied with, or the decree recites and shows affirmatively, that copies of the petition and notice were directed to the defendant, as required by that section, or an excuse for not so mailing them, before a default entered.

To sustain a title under a sale for taxes, under a statute authority, in derogation of the common law, every requisite of the statute, having the semblance of benefit to the owner, must be strictly complied with, and the claimant under such a title, must prove that all the requisites

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of the law have been complied with ; and unless the steps which the law requires to be taken, have been regularly pursued, the court has no jurisdiction under the statute, to divest a party of his property, and vest it in the State, or another person.

Although a decree of foreclosure under a tax deed, may recite that it “appeared to the court, that the defendant had been served with notice of the pendency of the suit, as required by law,” the complainant, in a proceeding to set such decree aside, may aver and prove, that copies of the petition and notice were never directed to him, as required by section 1826 of the Code ; and that the proof required, was not made, nor any excuse shown, before taking a default against him. The proof, that a copy of the petition and notice was directed to the defendant, or that his residence is unknown, as required by section 1826 of the Code, is an element of jurisdiction ; and if the record does not show that such proof was made, before the default was entered, the decree is void.

Where in a proceeding to set aside a decree of foreclosure under a tax deed, the petition alleged, that in 1852, complainant purchased the lands in controversy ; that he was then, and continued to be a resident of the State of Virginia ; that for the year 1853, the said lands were assessed to G. and not to the complainant, the taxes amounting to \$1,98 ; that in 1854, his agent called upon the proper officer, to pay the taxes on said land, and was informed that said land was not assessed, and no taxes were to be paid for the year 1853 ; that in May, 1854, the treasurer sold said lands for the delinquent taxes of 1853, to the defendant, who, on the 9th of June, of that year, received the said treasurer’s deed ; that on the 24th of March, 1855, said defendant filed in the district court, his petition to foreclose the complainant’s equity of redemption in and to said land ; that a notice, directed to complainant, was placed in the hands of the sheriff, who returned thereon, that said defendant (now complainant) was not found within his county ; that at the next April term of said court, an order was entered, continuing said cause until the next term, and directing publication to be made, as required by law ; that at the November term, 1855, of said court, the said published notice, with the affidavit of the publisher, was filed, and thereupon default was entered against this complainant, and a decree rendered in favor of the then plaintiff, for the land ; that during all this time, complainant was a resident of the State of Virginia ; that he had no knowledge of the levy of said taxes, nor of the purchase by defendant of said land ; that he was ignorant of the institution or pendency of said suit, or of the judgment, until the spring of 1857 ; that he paid the taxes for the years 1854, 5 and 6 ; that the notice by publication, was not given, as required by law ; that at the time of the rendition of said judgment, no proof was made to said court, that a copy of the petition and notice had been sent to the defendant, nor excuse shown for not sending the same ;

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that no such copies ever were sent, in fact; and that said defendant neglected and refused to send complainant copies of the petition and notice, for the purpose of obtaining said decree, without the knowledge of this complainant—to which petition was attached a copy of the decree under the tax deed, which decree, (among other things) recited “that defendant being called, came not, but made default, and it appearing to the court, that defendant had been served with notice of the pendency of this suit, as the law directs;” and where the court sustained a demurrer to, and dismissed the bill: *Held*, That the court erred in dismissing the bill.

Appeal from the Keokuk District Court.

TUESDAY, JUNE 22.

IN CHANCERY. Demurrer to bill sustained, and complainant appeals. For the material parts of the bill, and the grounds of demurrer, see the opinion of the court.

Jos. M. Casey, for the appellant.

Knapp, Caldwell and Wright, for the appellee.

WRIGHT, C. J.—The complainant sets forth in his bill, that in 1852, he purchased from the United States, the lands in controversy, lying in Keokuk county; that he was then, and continued to be, a resident of the State of Virginia; that for the year 1853, said lands were assessed to Jesse Gahan, and not to the petitioner, and the said taxes, amounted to one dollar and ninety-three cents; that in 1854, his agent called upon the proper treasurer, to pay the taxes on the land, and was informed that said land was not assessed, and that no taxes were to be paid for the year 1853. He further represents that in May, 1854, the said treasurer sold said lands for the delinquent taxes of 1853, to the defendant, Carr, who on the 9th of June of that year, received the said treasurer's deed; that on the 24th of March, 1855, said defendant filed in the district court, his petition to foreclose the plaintiff's equity of redemption in and to said land, claiming the right to so foreclose

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under and by virtue of his said purchase at said tax sale; that a notice directed to complainant, was placed in the hands of the sheriff, who returned thereon that said defendant, (now complainant), was not found within his county; and that, at the April term, 1855, of said court, an order was entered continuing said cause until the next term, and directing publication to be made, as required by law. He also represents that at the next term, to-wit: in November, 1855, the said published notice was filed, with the affidavit of the publisher, and that thereupon a default was entered against the complainant, and a decree entered in favor of said Carr for the land.

The bill then proceeds to state, that during all this time, complainant was a resident of the State of Virginia; that he had no knowledge of the levy of said tax, or of the purchase of said land by Carr; that he was ignorant of the institution or pendency of said suit, by Carr, or of the judgment, until in the spring of 1857; that he paid the taxes for the years 1854, 1855 and 1856; that the notice by publication was not given as required by law; that at the time of the rendition of said judgment, no proof was made to said court, that a copy of the petition and notice had been sent to the defendant, nor excuse shown for not sending the same; that no such copies ever were sent, in fact; that about the time of said sale by the treasurer, the said treasurer's books were changed, so as to show that said lands were assessed to this complainant; that defendant, Carr, had knowledge of this fact; that he fraudulently obtained said decree; that he fraudulently used and inserted the name of said complainant, as the person to whom said land had been assessed; and that he neglected and refused to send to the complainant copies of the petition and notice, for the purpose of obtaining said decree, without the knowledge of this complainant. Copies of all the papers in said proceeding, are attached and made part of the bill. The prayer is, that said decree be held null and void; that it be set aside; and the title in said land vested and confirmed in complainant, or if meet and prop-

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er, that the said decree may be reversed. The decree, (as shown by the copy attached to the bill), recites "that the cause came on to be heard, upon the petition of plaintiff; that defendant being called, came not, but made default; and it appearing to the court that defendant had been served with notice of the pendency of this suit, as the law directs, it is therefore considered," &c., closing in the usual form of a decree in chancery, vesting the title in Carr, and barring the defendant's equitable right to redeem the said lands.

The demurrer to the bill specifies a great number of causes, some of which were sustained, and others overruled. As the complainant appeals, and relies upon the fact that the court erred in sustaining the demurrer for any one of the causes, we shall confine ourselves to such as were sustained. These are as follows: *First*: That Carr is not charged with having colluded with the treasurer, in deceiving complainant's agent, and any mistake made by such officer, cannot prejudice the purchaser. *Second*: That it can make no difference, as to the rights of the purchaser, that the land was assessed to Gahan, instead of McGahan. *Third*: That the payment of the taxes for the years 1854, 1855, and 1856, cannot affect the validity of defendant's title. *Fourth*: Because the bill shows a good title in defendant, and does not make a case entitling complainant to equitable relief.

The first, second, and third causes may be considered together. However promptly the complainant may have paid the taxes for other years, cannot avail him, if he failed for 1853, and such steps were taken, on account of his delinquency, as divested him of his title. Neither can it avail him, as against Carr, that the treasurer made a mistake, and deceived his agent, unless some collusion or fraudulent combination between the treasurer and Carr could be shown. And as to the mistake in the name of the person to whom the property was assessed, we are clear that this can make no difference. For, when we consider that this, and the other objections, are urged after

the decree has been entered, and insisted upon to defeat and set aside the judgment of a court having jurisdiction over the subject matter, they lose all the force or weight which they otherwise might have. *Gaylord v. Scarff, ante*, 179.

Under the fourth cause, the whole merits of the bill, are presented for our consideration. And, *first*: complainant insists that the bill is sufficient, and the decree should be set aside, because of the failure of Carr to send to him a copy of the petition and notice, no excuse being shown for such failure. Will a neglect in this respect, render the decree void; and if so, can the complainant be allowed to show it, against the averments of the decree itself?

We have heretofore held, in a direct proceeding on appeal, that it was error, to enter a judgment by default, until such proof was made, as is required by section 1826 of the Code. *Byington v. Crosthwait et al.*, 1 Iowa, 148; *Carr v. Kopp*, 3 Ib., 80. The effect of the failure to send such copies, where a decree or judgment is attacked, as in the case before us, has not been determined by the present members of this court.

The law is, that when service has been made by publication only, and no appearance had, default shall not be entered until proof has been made, that a copy of the petition and notice, was directed to the defendant, through the post office, at his usual place of residence, (stating the place), in sufficient time for his appearance, or that such residence is unknown to the plaintiff, or his attorney, or business agent, and could not, with reasonable diligence, be ascertained.

To sustain a title, under a sale for taxes, the following principles were recognized by this court, in the case of *Scott v. Babcock*, 3 G. Greene, 133: If lands are taken, under a statute authority, in derogation of the common law, every requisite of the statute, having the semblance of benefit to the owner, must be strictly complied with. A penalty so severe as this, should not attach, unless the officers of the government—its agents—have strictly com-

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plied with, and fulfilled their duty. The law must have been strictly performed. Every statute authority, in derogation of the common law, to divest the title of one, and transfer it to another, must be strictly pursued, or the title will not pass. The claimant, under such a title, must prove that all the requisites of the law, have been complied with; and unless the steps which the law requires to be taken, have been regularly pursued, the court has no jurisdiction under the statute, to divest a party of his property, and vest it in the State, or another person. *Williams v. The State*, 6 Blackf., 36; *Atkins v. Kinman*, 20 Wend., 241; *Kellogg v. McLaughlin*, 8 Ohio, 114; *Sharp v. Spain*, 4 Hill, 81. And while these rules and principles may be regarded as strict, they are fully sustained by the authorities, and authorized by the peculiar nature and character of the proceeding under which the purchaser claims.

Keeping in view these general principles, it seems to us that the case of *Broghill et al. v. Lash*, 3 G. Greene, 357, fully disposes of this. In giving a construction to section 1826 of the Code, this language is used: "Without a compliance with the requirements of this section, the default could not be legally entered. Without a service on the defendant, in one of the modes prescribed by statute, the district court could not acquire jurisdiction of his person. The statute directly prohibits the entry of the default, until this proof of the mailing of the notice, &c., has been made to the court; until this was done, defendant was not in court. The question presented for adjudication, is not one of irregularity in the procedure of the court below, but of jurisdiction of the person of the defendant. It goes to the power of the court to try, determine and pass the judgment. Much might be said of the propriety, nay, necessity, of guarding carefully the rights of persons, whose interests are disposed of by a summary, stringent, and *ex parte* legal procedure; but here it is deemed unnecessary, as we think the provisions of the Code are such as to furnish the most ample evidence of the intent of the legislature on this subject. The *proof*

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required, where service has been made by publication only, and no appearance had, is clearly made a condition precedent, without which, the court had no power to enter the judgment by default. *It is a jurisdictional fact, upon which, by the statute, the power of the court to act, is made to depend, and should appear of record in the case.* In the stead of personal and actual service, and a return thereof into court, by virtue of which, the court acquires jurisdiction of the person of the defendant, it is a mode of service by construction, provided by legislation to be used in proceedings mostly *ex parte*, and hence the reason of the strictness of the provision. The proof required, is made an element of jurisdiction by the statute, and the record should show that it had been made before the default was entered." And see *Lot No. Two v. Swetland*, 4 G. Greene, 465. Whatever we might think of this rule, were it *res integra*, yet as a rule property, we are not at liberty to change it, without some imperious necessity. *Taylor v. French*, 19 Vermont, 49; *Bellows v. Parsons*, 13 N. H., 256; *Harmel v. Smith*, 15 Ohio, 134.

In this case, the complainant avers that he attaches to his bill, copies of all the papers and proceedings in the action commenced by Carr. He avers that the proof required, was not made; and that, in fact, copies of the petition and notice never were forwarded to him by mail, nor was any excuse shown for not sending the same. If so, upon the principles enunciated in the case, in 3 G. Greene, 357, the court had no jurisdiction, and no power to render the decree.

In coming to this conclusion, the leading difficulty has been, that the decree now attacked, recites that it was made to appear to the court, that the defendant had been served with notice of the pendency of said action, as required by law; and we have doubted whether this averment was not sufficient, and whether the complainant should now be allowed to set up that the requisite proof was not made. The language of the law is, that "when service has been made by publication only, and no ap

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pearance had," &c. If we regard the publication as the service, then the recital in the decree would be fully answered, without reference to the inquiry, whether the required proof was made. The case above recited, however, seems to treat the sending of a copy of the petition and notice, as an essential part of the service, and expressly holds that such proof should appear of record in the case—that the record should show that it had been made before the default was entered. And we can hardly believe, that it would be safe to establish the rule, that the property of one can be divested, and vested in another, upon an *ex parte* proceeding, unless the record shall show that such proof was made, (or excuse shown for not making it,) or the decree itself recite and show affirmatively, that such copies were mailed. Such a construction, tends more to secure parties in their just rights, and cannot reasonably work injustice to any one. If the rule is too strict, the remedy is with the law making power.

We conclude, therefore, that this point in the bill is well made, and that the court below erred in holding that it showed a good title in the defendant. This conclusion renders it unnecessary to notice the other points made by the appellant.

Judgment reversed.

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6	339
104	709
6	339
121	281

Where a party pleads a former adjudication of the matter in controversy, he should bring into court and make proof of, an exemplification or transcript of the former cause, and thus make it a part of his case. If he does not do so, his adversary may take exception to the pleading, but is not obliged to do so.

Where on an issue of a former adjudication, a certified copy of a judgment is offered in evidence, it will be insufficient, without the petition and pleadings upon which it was rendered.

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Where the parties are shown in the title of a cause in equity, it is not necessary to repeat the names of the parties in the body of the decree. Where the term of court at which a decree was rendered, is mentioned in the transcript of a cause in equity, the date of the rendition of the decree need not be stated in the body of the decree, unless some act is to be done in a definite period from the date, or the rendition of the decree; and then, if no other day is named, such act takes date from the last day of the term.

Whether a decree in equity be an interlocutory or final one, must appear from its nature. It need not be called by a name.

If a decree does not state that it is rendered upon a default, it is presumed to be upon appearance.

When a subject matter is legally within the jurisdiction of courts of superior and of general jurisdiction, and the parties appear to have been brought, or to come, within it, a strong presumption of correctness and regularity attends their proceedings, and they are not under the necessity of stating upon their records many facts which a court inferior and of limited jurisdiction must, or must show in some other way.

Where the transcript of a case, shows the appearance of the parties, the case will be presumed to have been properly heard, although the decree does not state in terms, whether it was heard upon the pleadings, or upon the pleadings and proofs; and this holds good even on appeal, to some extent.

Where a decree does not set out the facts found, upon which it is rendered, on appeal, the presumption in favor of the regularity of the proceedings of courts superior and of general jurisdiction, will assume that sufficient facts were shown to warrant the decree, unless the contrary be made to appear from the record or from the testimony.

It is not necessary in a decree in equity, to set out the facts found, upon which the decree is based. All the papers of a cause constitute the record in a chancery case, and the decree assumes them and their contents. And so of the evidence, where it is in writing.

Where a decree in equity, cancelling a deed, defines the particulars of date, &c., and names more points of description than the petition, the decree is not incongruous. If the decree clearly identifies the deed decreed to be cancelled, minor points of misdescription may be disregarded.

Where a decree, in part, requires that to be done, which the court had no power to decree, that portion of the decree beyond the authority of the court to order, becomes mere surplusage, and nugatory, and forms no ground for a reversal of the decree, and especially so where it would not open the cause to a rehearing.

Where in a proceeding in equity, to cancel a deed, and to compel a conveyance to the complainant, the bill alleged that the deed to one of the respondents was never delivered—that he was not entitled to it—that he obtained it fraudulently—and that it was null and void, and gave

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him no title, which allegations were found by the court to be true; and where the court then decreed that the respondent convey to the complainant; *Held*, That the decree was erroneous.

Where a decree is technically defective only, on appeal, it will be corrected in the appellate court.

Appeal from the Polk District Court.

TUESDAY, JUNE 22.

This cause was before the court at the June term, 1855, and is reported in 1 Iowa, 257. The present petition is substantially like the former one. Such differences as are regarded of consequence, are noticed in the opinion of the court. To the present petition, which is in chancery, the respondent answers, that the matters set forth by the complainant, have heretofore been adjudicated between these same parties; that is to say, in a suit between the said Ayres as plaintiff, and the said Campbell as defendant, instituted in Polk county, and by change of venue taken to Warren county, wherein judgment was rendered at the June term, 1855, and which judgment has never [been reversed or overruled, which the defendant is ready to verify by the record. The replication avers that the matters and things set forth in the petition, were not adjudicated between the parties in the said suit mentioned in the answer. This issue was found by the court, in favor of the complainant, and thereupon a decree was rendered accordingly, that the equity of the case was with the petitioner, and that the deed from the county of Polk to the said Ayres be declared cancelled, set aside, and held for naught.

J. E. Jewett and *J. A. Kasson*, for the appellants.

I. If a decree, finally rendered, does not recite the facts on which it was founded, or which the court considered as proved or admitted, it is error on the face of the decree. *Burdine v. Shelton*, 10 Yerg., 41; *Peters v. Rossiter*, 1 Root, 273; *Bacon v. Childs*, 1 Ib., 466; *Sampson v.*

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Hunt, 1 Ib., 521; *Wernway v. Brown*, 3 Blackf., 458; *Brend v. Brend*, 1 Vern., 215.

II. There is no certainty of description of the deed to be found in the allegations, and no copy exhibited; and the description in the decree is not *secundum allegata*, which is necessary. 10 Wheat., 188.

III. The process for enforcing this decree, as ordered by the court, is not known to our equity practice. 2 Daniels Ch. Prac., (Perkin's ed.), 1289, 1293 to 1295. Our equity practice stands unaffected by statute enactments, except, possibly, some formalities of pleading.

IV. A writ of assistance may issue, and is, in ordinary cases, the first and only process for giving possession of land, under adjudication of the court, in some jurisdictions—not all. *Valentine v. Teller*, 1 Hopk., 422; *Devanceu v. Doe*, 1 Edw., 272; 1 Hopk., 221; 4 Johns. Ch., 609; *Wallen v. Williams*, 7 Cranch, 602; 1 Harr. & Johns., 370; 13 New Hamp., 14.

V. A decree in equity does not, *per se*, divest the title at law, but can only compel the person who has the title, and who is mentioned in the decree, to convey. *Proctor v. Ferebee*, 1 Ired Eq., 146.

VI. When it is material to either party, the caption or date, should be made to correspond with the time of the actual entry of the order. *Whitney v. Baldwin*, 4 Paige, 140.

VII. It is evident the plaintiff should have exhibited the whole record from Warren county, and not the mere judgment.

VIII. In this cause, it appears to have been so imperfectly tried, and the elements for a decision so wanting in the final action of the court, that the supreme court cannot be satisfied, without a trial *de novo*, what are the real equities between the parties, to be incorporated in the decree.

Curtis Bates, for the appellee, cited *Arnold v. Grimes & Chapman*, 2 Iowa, 1; 2 Ohio, 274; 3 Johns., 268; 8 Cowen, 543; 2 Iowa, 27.

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WOODWARD, J.*—When this cause was before the court, at a prior term, it turned upon the plea, or answer of a former adjudication. The bill was dismissed, but without prejudice to any farther proceeding. This was in consequence of the apparent equity in the case, which was not fairly brought out by the state of the pleadings. The present bill is more complete, and more fully explains some of the circumstances, and particularly that of the former adjudication by the suit in Warren county. But in consequence of the attitude of the present pleadings, we shall not be led to examine the facts of the cause in detail.

The complainant bases an equitable claim upon the assignment of the county bond to him—the mortgage of Crews to him and Scott, and Scott's assignment—and upon plaintiff's redemption from Ayers, under the sale on Duncan & McLaughlin's judgment. The first of these—the assignment of the county bond—is the substantial ground of the petitioner. He, of course, claims that the bond is outstanding and valid, whilst the deed from the county to Ayers, was never delivered, nor had the occasion for its delivery arrived, but that he obtained the possession unlawfully and fraudulently, and that the same is no deed. This was the substance of the case between the parties, and to which the respondent answers, and pleads an adjudication of this whole matter, in the suit in Warren county. This was the issue of fact; and this was tried by the court, which found that these matters were not adjudicated in that former suit.

This cause is in equity, and this court might review the conclusion of the district court upon the above fact, but the respondent has given us no material by which to try it—no evidence upon which to review it. He pleaded the mere fact of a prior adjudication, but did not bring into

* WRIGHT, C. J., having been of counsel, took no part in the determination of this cause.

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court, nor make profert of, an exemplification, or transcript of that former cause, tried in Warren county. It was his duty thus to make it a part of the case, and the complainant was entitled to take exception to the want of it, but he was not obliged to do so, and did not, but pleaded to issue, leaving the respondent to prove his affirmative allegation in relation thereto. The evidence which he offered, if any, is not before us.

The complainant has made an exhibit of a judgment, rendered in Warren county, in favor of this defendant against this plaintiff; but, admitting for the present, that that copy of judgment is so in evidence, that the respondent may avail himself of it here, still it is not sufficient alone, without the petition and pleadings upon which it was rendered.

The position of the case then, is that the court has found that the former adjudication did not involve and decide the questions and matters set up in the present bill. It remained to the court, therefore, only to determine whether the bill makes a case for the complainant, and shows ground for relief. The allegations of the petition remained undenied, and were consequently taken as true. The averments concerning the bond and its assignment by Crews to Campbell, and concerning the deed from the county to Ayers, and the manner in which he became possessed of it, clearly make a case for the petitioner, and the court did not err in rendering a decree in his favor, as respects Ayers. In order to dispose of the whole matter, and do complete justice, the county should have been made a party defendant, that the complainant might obtain its title; but no objection is made on this account, (and perhaps none would lie), and there was no objection to the court disposing of Ayers and his claims.

But the only objections to the decree, made in the argument of appellant, are mostly of a somewhat technical nature, going to the manner and form of it. To be able to apply and examine them, it is necessary to state the substance of the record. The transcript shows the dates, and

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terms of filing the several papers; that is, the petition, answer, and replication; and comes to the October term, A. D. 1857, when the decree was rendered. This states the title of the cause, and commences thus: "This day, the court being fully advised in the premises, finds that the equity of this cause is with the petitioner;" and proceeds to find that these matters had not been heretofore adjudicated, in the suit mentioned in the answer; and therefore, decrees, that the deed from the county to Ayres be set aside, and held for naught; that the title is in the petitioner; that defendant convey the same to petitioner, by good and sufficient deed, within thirty days, or the decree to have the effect of such conveyance; that defendant restore possession within two days, or a writ of restitution to issue; that defendant pay the costs, and execution issue therefor; and that Campbell pay Ayres two hundred dollars, and execution issue for the same. And the decree is properly signed.

The respondents now allege, that the decree is "altogether insufficient, irregular and uncertain, and should be annulled, and the cause remanded for a hearing *de novo*." His objections are summed up in the position, that "a good decree must contain the following particulars, at the least: *First*: It must show the parties and venue. *Second*: The date of its rendition or entry. *Third*: How entered—that is, whether on default, on pleadings, on proofs; whether interlocutory or final; whether on appearance of parties or counsel, or by consent, or submission regularly. *Fourth*: On what facts it is based. *Fifth*: The mandate, or order, which must be within its chancery powers." The defendant then proceeds to point out specific defects or errors, as he considers them. One or two remarks will cover several of them, without going into detail. *First*: Several things are shown, or appear of record, to the supposed want of which, he objects. Thus, the parties are shown in the title of the cause, stated in the manner usual in all our records. It is not deemed necessary to repeat them in the body of the decree. The venue is, without doubt,

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shown in the transcript of the proceedings. The term is given, and no more is requisite, unless some act, as in this case, is to be done in a definite time from the date or the rendition of the decree, and then, if no other day is named, such act takes date from the last day of the term. But further, although the date does not appear in the transcript, yet it must, we conceive, appear in the actual records of the court, if the proceedings of each day are under their proper date, as is usual, so far as we have knowledge. And, again; whether it be a final or interlocutory order or decree, must appear from its nature; and for this end, it need not be called by a name. And if the decree does not state that it is rendered upon a default, it is presumed to be upon appearance.

Secondly: There are certain important presumptions which attend the proceedings, and attach to the record of courts superior and of general jurisdiction. When a subject matter is legally within their jurisdiction, and the parties appear to have been brought, or to come within it, a strong presumption of correctness and regularity attends their proceeding, and they are not under the necessity of stating upon their records, many matters which a court inferior and of limited jurisdiction must, or must show in some other way. This case shows the appearance of the parties, and it will be presumed to have been properly heard, although the decree does not state in terms, whether it was heard upon the pleadings, or upon the pleadings and proofs; and this holds good even on appeal, to some extent. In the present case, the pleadings alone are sufficient to sustain the principal matters found by the decree. As the record does not state that the decree was upon a default, but shows the contrary, it will be taken to have been rendered upon such other ground as the record allows, which, in the present case, is upon the pleadings, or upon evidence.

But there is another, and a very important class of subjects, to which this presumption reaches—even on appeal; and that is the facts upon which the decree is rendered.

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The respondent claims that the decree should set forth the facts found, upon which it is based. This presumption will assume that sufficient facts were shown, even on appeal, unless the contrary be made to appear from the record, or from the testimony. The former English practice was, to set forth in the decree the facts upon which it was based, and such may be the practice there at this time, but it is not the course in the greater part of the American States. It is doubted whether the omission of them would ever have been held error, or a ground for reversal, even in England. But in many of the United States, this has rarely been so, and especially in the newer States. With the cessation of the custom of making a complete record in every cause, a change has followed in many of the particulars of practice. All the papers of a cause constitute the record, and the decree assumes them and their contents. And so of the evidence when it is written, as it should be, in chancery causes. There is no doubt that it would be a better and more satisfactory practice, if the judgments, and especially the decrees in equity, of our courts, were entered more fully, showing all that is requisite to give jurisdiction, and the facts found to exist, upon which the decree is based, but we cannot say that it has been peremptorily required in the past judicial history of the State and territory of Iowa.

The foregoing remarks apply to several of the points made by the defendant, in objection to the decree. A few will be more specifically named. One of these is, that the decree orders the cancellation of a deed different from that named in the petition, and not identified with it. Though the decree names more points of description than the petition, there is no incongruity in this. The decree mentions it, with several of these points, and among them the date, and that it was executed by three persons, named as the board of county commissioners; and it is objected that the petition mentions it as a deed executed by the county clerk. This is not altogether correct. The petition says that Crews, in order to carry out his agreement

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with Ayres, went to the county clerk's office, and requested him "to make out a deed for said lot, in the name of said Ayres as grantee, and have the same ready for delivery to him, upon his compliance with the conditions of the contract." There is no inconsistency in this. The declaration does not represent it as a deed executed by the clerk. In truth, there is no description of it in the petition. This only narrates the circumstance as to how, and why, and about when, a deed was made by the county authority, conveying the lot to respondent; and the decree defines the particulars of date, &c. These are the only facts of importance—they point to the deed intended—and these being ascertained, minor points of misdescription would be disregarded. But we do not perceive that they exist.

To some of the objections, we remark, briefly: If the decree cannot operate as a conveyance, as it directs, then this part of it becomes mere surplusage and nugatory, and forms no ground for a reversal, especially as it would not open the cause to a re-hearing. Whether the court was authorized to issue a writ of restitution, and other process ordered, leads to a larger inquiry than counsel have anticipated—to an inquiry into the intent of the Code, in respect to law and chancery practice; and as none of these things, in whatever light viewed, would give the respondent a new trial, we decline entering into them.

But we come to a point in which there is more reason to think there is substantial error. The bill proceeds upon the ground, and makes the averment, that the deed from the county to Ayres, was never delivered; that he was not entitled to it; that he obtained it fraudulently, and that therefore, it was of no force, but was null and void, and gave him no title. The court found this to be so, and correctly, as we believe. But then, as a consequence, it could not decree that the respondent convey to complainant, for the former had nothing to convey.

Again: the court finds the title to be in the petitioner. But how is it there? It is not by a deed from the county.

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Nor is it from the defendant. The petitioner seems to claim it to be in him, by virtue of his redemption from Ayres' purchase under the judgment of Duncan & Laughlin, or by virtue of the release of Ayres. But we doubt much whether he has a legal title from either, or any of these sources. It is manifest that the petitioner has not the legal title, for he has not a deed from the county, nor has he such title from the county, through any one. The only deed from the county, is that to Ayres, and that being cancelled, there is no legal title in any one, derived from the county, but it remains there. In short, Crews had an equitable title from the county; that is, he had a right, by which, apparently, he might obtain the legal title. This he assigned to Campbell, who now has the same right. The deed from the county to Ayres, being set aside by this decree, the only obstacle is removed which prevented the county conveying to Campbell; and had this holder of the legal title, been made a party to this bill, that end could have been accomplished in this same decree, if the obligation still exists. But nothing forbids a voluntary action in this respect.

There is no objection made to the decree, nor any defect found therein, which should require a trial *de novo*; therefore, it will only be corrected in the portions held technically erroneous. Wherefore, it is ordered, adjudged and decreed, that so much of the decree of the district court, as holds that the legal title to the said lot is now in the complainant, and so much of the same as decrees that the said Ayres convey the said lot to the said James Campbell, be reversed and set aside; and that the residue of the said decree be, and remain in full force. The costs herein to be paid by the respondent.

Reversed in part.

Cox & Shelley v. Carrell & Co.

COX & SHELLEY v. CARRELL & CO.

Where there is an agreement between the parties to a written contract, for a consideration, to extend the time of payment to a given period, an action upon the written contract cannot be sustained, if brought before the expiration of the time for which the payment was extended.

The period for the performance of a written contract, may be varied by a subsequent parol agreement.

Where in an action on a promissory note, commenced on the 27th of March, 1857, the defendants answered, alleging, that in consideration of the payment of the sum of \$1,136,41 on said note, without discount or allowance therefor, two months before the note became due, and when the note was not drawing interest, the plaintiffs agreed with the defendants, that the time of payment on the balance due on the note, should be extended to the first day of August, 1857, and the same should not be due until then, and that the action was commenced before the note became due under the agreement—to which answer there was a demurrer, which was sustained by the court; *Held*, 1. That the court erred in sustaining the demurrer; 2. That the matter pleaded was good as a plea in abatement; 3. That the agreement set up in the answer, to be valid, need not be in writing.

Appeal from the Boone District Court.

TUESDAY, JUNE 22.

The defendants were sued on a promissory note for \$1,859,27, upon which were indorsements to the amount of \$1,183,13. The note fell due February 25th, 1857—six months from date—the principal indorsement, being of \$1,136,41, was made December 26, 1856. The defendants answered, pleading that in consideration of the payment of the said sum of \$1,136,41, without discount or allowance therefor, two months before the same was due, and when the note was not drawing interest, the plaintiffs agreed with the defendants, that the time on the balance should be extended to the first day of August, 1857, and that the same should not be due until then; and that the action was commenced on the 27th of March, 1857, before the note became due under the above agreement. To this

answer, the plaintiff demurred, and assigned three causes : *First* : that the answer does not show a substantial cause of defense. *Second*, That it does not show that the agreement was in writing. *Third*, That no written agreement is filed with the answer. A motion was made by the defendant for a continuance, accompanied by an affidavit stating, in substance, that he could prove, and desired to prove, the above defence as to the extension of time.

The only record entry contained in the transcript is, that on the fourth day of the April term, 1857, the cause came on to be heard ; and that the court having heard the allegations and proofs, and being fully advised, ordered and adjdged that the plaintiff recover the sum of six hundred and eighty-four dollars and forty one cents, with ten per cent. interest until paid, and the costs of suit. A bill of exceptions certifies that the court sustained the demurrer, and held the answer to be insufficient ; and thereupon entered a default against the defendants, to which ruling and opinion they excepted.

John A. Hull, for the appellants.

Rankin, Miller & Enster, for the appellees.

WOODWARD, J.—This cause is but one more added to the long list before this court, showing that there is not sufficient attention bestowed upon the entries of the proceedings of our courts. Our rights of property depend upon them, and they should be more full and complete. In this case, there is no entry of the disposition of the demurrer, nor any showing that the defendant had an opportunity to amend or to plead over.

But we proceed to the judgment. The entry of the judgment should have been more explicit. It does not appear upon what ground the court proceeded. It is manifest that they sustained the demurrer upon some ground ; but it is sometimes material to know upon what one, for different consequences may follow from different grounds.

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If the court sustained the demurrer upon the first cause—that is, that the answer did not show a substantial ground of defence—there was error; for, looking only at the matter pleaded, it was clearly good as a plea in abatement—since, if the plaintiffs made the agreement alleged, they could not bring their action until after the time of extension.

The second cause of demurrer was, that the answer did not allege the agreement to be in writing. If it was sustained upon this, the ruling assumes two things: *First*, That the agreement must be in writing, in order to be valid; and, *Second*, That the pleading must aver it to be in writing. The first of these propositions would be an error. A written contract may be affected in several ways, by parol agreement; for instance, it may be wholly set aside, or abrogated—the particulars, or details of its performance, may be varied, as is often the case in building contracts—and the place of performance may be changed, and so the time may be. Parol evidence is competent to prove the enlargement of the time of performance, says Mr. Greenleaf, in 1 Greenl. Ev., 400, section 304. The rule seems to be that parol evidence is admissible, if it is not proposed to show that a different contract was made, originally, from that expressed in the writing, but only to show that some subsequent arrangement was entered into, in reference to the time, place, or details of performance. And it is yet a different question whether the contract need be alleged to be in writing, when the law requires it to be written, or whether the party may simply plead it, and let the objection to a want of writing come up on the evidence offered. In the present state of the case, a decision upon this is not required.

The third cause of demurrer was, that the written agreement, or a copy, was not annexed to the petition. This objection disappears under the decision of the preceding ground, holding that the contract is not required to be in writing.

The court erred, therefore, in sustaining the demurrer, and the judgment is reversed.

Prouty v. Edgar.

PROUTY v. EDGAR.

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Where a party, at the time of making a deed of real estate, represents himself to be of full age, and the grantee, relying upon such representations, receives the same, the grantor cannot disaffirm the contract on the ground of infancy.

Where a party holds the legal title to real estate, in trust for another, who has executed a bond for the conveyance of the same, and received the purchase money, and where the trustee conveys the land in accordance with the requirements of the bond, he cannot set aside the deed, on the ground that he was a minor when the deed was executed; nor for the reason that the bond was obtained from the party holding the beneficial interest in the land by fraud and duress.

In equity, an infant who holds the legal title to land, as trustee, may be compelled to convey the same.

Appeal from the Mahaska District Court.

TUESDAY, JUNE 22.

Bill in chancery to set aside a conveyance of real estate, on the ground that it was obtained by fraud and duress. The petition alleges, that in the year 1850; the complainant purchased with his own money, and for his own use and benefit, the said real estate, describing it; that he received a certificate of location, which he has since lost; that about the time he entered said land, there was a great excitement in the neighborhood in relation to entering lands upon which persons had claims; that the respondent took advantage of said excitement, and asserted that he had a claim on said land, according to the claim laws, at the time the same was entered; that in fact, respondent had no such claim; that the respondent, by misrepresenting the facts, induced a large number of men to assemble together, who went to the complainant for the purpose of compelling him to convey the said land to the said respondent; that the said persons, being informed that the complainant was a minor, then went to A. T. Prouty, the father of complainant, and by force and arms, threats and menaces, and duress, compelled the said A. T. Prouty, to

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give to said respondent a bond for a deed for the said land, and to convey the said land to the said respondent, or to have the same conveyed, by the time complainant should become of age, to which bond was affixed a penalty of two hundred dollars; that in the spring of 1851, the complainant was preparing to go to California; that in consequence of the importunities and threats of said respondent, and other persons in his behalf, and the fear occasioned thereby, together with the fact that his father was so bound as aforesaid, the complainant against his own will and inclination, was forced to execute to said respondent, a deed for said land, which deed was acknowledged before the clerk of the board of commissioners of Jasper county; that he never received any consideration whatever for the said land; that said respondent never paid sixty dollars, nor any other sum for the said land; that at the time said deed was made, said complainant was a minor, and did not arrive at majority until February, 1852; that said deed was not acknowledged before any officer authorized to take the acknowledgment of deeds; and that the said land is rightfully the property of the complainant. The prayer of the bill is, that the said deed may be set aside and cancelled, and for general relief. A copy of the deed, which bears date April 26, 1851, is attached to the petition.

The answer of the respondent, admits the entry of the land, and the execution of the bond and deed as alleged, and denies the allegations of fraud and duress, and all the other material allegations of the bill. The answer then alleges, that at the time said land was entered, the respondent had a possessory right thereto, usually known as a "settler's claim," upon which he had valuable improvements; that he had for a number of years been in possession of the same; that he had his claim marked out and established, according to the rules and regulations of the neighborhood in which the same is located; that having such claim and settler's right, the father of said complainant procured said complainant to enter said land, and furnished him fifty dollars to make said entry; that soon

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after said entry, respondent learned thereof; that the father of complainant was waited upon, in a friendly manner, and informed of the rights of respondent in and to said premises; that an amicable and friendly arrangement was made, by which respondent gave to the said A. T. Prouty, his note for sixty dollars, payable a short time thereafter, which was agreed upon as the consideration for said land, and in consideration thereof, the said father of complainant, voluntarily gave this respondent his bond, obligating himself to convey to respondent said land, upon the payment of the said sum of sixty dollars, or when the said complainant, whom the father represented to be under age, should arrive at his majority; that afterwards said note for sixty dollars was promptly paid by the respondent—and the father, still representing the son to be under age, made another bond, by which the full payment of the consideration money for said land, was acknowledged, and he therein agreed to have the said land conveyed, whenever his son should attain his majority; that in April, 1851, the complainant voluntarily came into the town of Newton, and there, freely and voluntarily, and without any fraud or compulsion, made and acknowledged a deed to respondent for said land; that at the time of making said deed, no persons were present except the officers, the witnesses, and the parties thereto; that at the time complainant entered said land, and before, he represented that he was of age; that from such representations, respondent had good reason to believe he was of age; and for some time before said deed was made, complainant engaged in business as an adult, and was so engaged at the time of making said deed; that said complainant never, in any way disaffirmed his said deed; that the land was entered by the son with the father's money, and for his benefit; and that complainant has repeatedly so stated.

The complainant replied, denying the new matter alleged in the answer.

The witnesses on the part of complainant, testified substantially as follows:

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Thomas Rees—I am acquainted with a quarter of land known as “the black quarter.” It was deeded by Anson T. Prouty to Joseph Prouty and Asher T. Prouty. One hundred acres off of the north side of the quarter was deeded to Joseph. Anson T. Prouty was the father of Joseph. The land was deeded under the following circumstances: Some time in the month of May or June, 1849, Anson T. Prouty was doing a job of breaking for me. I spoke to him about deeding this land, or a part of it, to Joseph. I told him that Joseph was a good boy, and he ought to do something for him, as he was his main dependence; and that it would be nothing more than right for him to deed Joseph a part of this land. After talking upon the subject for sometime, he concluded he would divide it between Joseph and Asher, and give each of them forty acres of timber besides. The land was not purchased by Joseph, but was a mere gift from the old man. The forty acres of land in controversy in this suit, had nothing to do with the deeding of the land in the “black quarter.” The land in the “black quarter” was not given in lieu of the purchase money for the forty acres in controversy in this suit. I am son-in-law of Anson T. Prouty.

Jesse Rickman—Anson T. Prouty gave to the respondent a bond for the land in litigation. It was signed by A. T. Prouty, Evan Adamson, and Joseph Prouty. The father signed Joseph’s name to the bond. The bond required the deed to be made in February, 1851, or 1852, I think. I am not positive about the time. The deed to the land was made either the last of April, or the first of May, previous to the time fixed in the bond. My impression is that the bond was given in the summer or fall of 1850, and the condition was that Joseph Prouty should make a deed to James Edgar, at the expiration of the time fixed in the bond.

Elizabeth Prouty—My age is sixty years. I am the mother of Joseph Prouty. Joseph was born on the 9th day of February, 1831.

Asher T. Prouty—I am a brother to the complainant.

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His age is twenty-four years. He was born February 8th, 1831. I mean that he is twenty-four next February. Myself and brother, most of the time, have lived at home. Joseph Prouty is now in California. He left for California, April 26, 1851. At that time he was a single man. My father, Anson T. Prouty, is not now living. While my brother was living at home, and before he went to California, he did not do business for himself, as a general thing. We kept a family record in the family Bible. It is now in California—was taken there in 1852. I heard Joseph say he did not intend to make a deed when he came of age.

Henry Rodgers—I had a conversation with the respondent, the day the deed was made to him for the land, by Joseph Prouty. Edgar came to me, and appeared very much agitated. He remarked that Joseph Prouty was coming across the prairie, and was on his way to California; that he could not go until he had made a deed for the land. I remarked something to him in regard to the deed being of no value, unless the complainant was of age. Edgar swore that he believed they had been fooling him, for he believed that Joseph had been of age for a year past, and that he would have the deed; that he was satisfied that Prouty was old enough to make a good deed, and he would have it, let the consequences be what they may; that he would risk its being a good deed; and that Prouty could not leave this town without making the deed. He appeared to be very angry. He further said that Prouty, the damned old scoundrel, had furnished the money to enter the land with, and was afraid to enter it in his own name. A short time after this, on the same day, I had a conversation with the complainant. The conversation took place in the spring of 1852, and I understood, Prouty was then on his way to California. The land in controversy, in the spring of 1851, was worth five dollars per acre. In the conversation I had with the complainant, above referred to, he told me, that if Edgar crowded on for the deed, he would make it, for he did not care a damn for it. He

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afterwards told me that he had made the deed, and the matter was settled. In the conversation I had with Edgar about making the deed, no threats were made against Prouty—more than that he should make the deed before he left.

The testimony on the part of the respondent was substantially as follows :

James Pearson—I am acquainted with the land in controversy. It is a forty acre tract adjoining the town of Newton, on the west side. Edgar had a claim upon it. It was made about nine years ago. I marked it out for his wife, before she was married—it was marked and staked out according to our rules. After she was married, it was re-marked for Edgar. The wife had work done on it first, for I helped build the fence on it, and after they were married, he had work done on it. He had the claim kept up, and it was never forfeited. A. T. Prouty, the complainant's father, told me that he had made a bond to Edgar for the conveyance to him of the land ; that his son had made a deed for the land, and Edgar had paid him (the father), for the land, with interest, which he never expected to get ; and that he had given the complainant other land in place of that in controversy. The complainant also told me, that he had got other land in lieu of that in dispute. A. T. Prouty is dead. When the complainant came to the county, he said he was eighteen years of age. That was eight years ago this fall. When he entered the land, his mother said he was in his twentieth year. I have heard his father say the same thing. I have heard the complainant say that Edgar had paid his father for the land, and he had got land in lieu of it. He also said he would not have entered the land, only to *devil* Edgar—he intended to make him enter it, or put him to some trouble.

Jesse Rickman—I know the land in controversy. It adjoins the town of Newton. In the spring of 1850, I think, old man Prouty gave a bond for a deed to the re-

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spondent at which time Edgar paid Prouty a balance that was due on a note. My understanding was that the note was given for the land. The old man Prouty, Evan Adamson, and Edgar came to me, and asked me to write a bond for a deed, to be made by Joseph Prouty when he should become of age. The time was stated in the bond, but I forget when it was. The old man signed his own name and Joseph's, and Adamson signed it as security. In April or May, 1851, I saw a paper handed to Joseph Prouty, when on his way to California, by the respondent. It was at the time Joseph Prouty executed the deed. It was said to be the bond for the deed. I wrote the deed, and it was acknowledged before me. A. T. Prouty, Edgar and Evan Adamson were present when the bond was executed, and Edgar, T. J. Adamson, and Henry Rodgers, when the deed was made. The note called for \$60, and was paid off at the time the second bond was made. I made a calculation of the interest on the note, at the time it was paid off. When I wrote the deed, Edgar and Thos. Adamson came in together, and I think Edgar requested me to write the deed. The complainant came in about the time it was filled up.

Evan Adamson—A. T. Prouty, the father of complainant, and myself, executed a bond to the respondent for the conveyance of the land in dispute. I do not recollect the exact time—it must have been about four years ago. I was asked by Prouty to go security on the bond, and did it. At the time the bond was executed, Edgar paid \$56 to A. T. Prouty for the land. Joseph Prouty made a deed for the land—it was made three or four years ago last spring. On the day the deed was made, I met Joseph Prouty on the street. He stated that he was on his way to California, and asked me if I knew where James Edgar was. I told him I did not—I supposed he was in town somewhere. He said, perhaps it would save trouble to have the deed made to Edgar, before he went to California. He told me to see Edgar and bring the bond, and he was willing to make the deed. I saw Edgar—he

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brought the bond, and the deed was made. Joseph Prouty handed me the bond, and told me to give it to his father. I took my name off, right where the deed was made, and Mrs. Prouty, the mother, called at my house and got the bond. At the time the deed was made, Joseph Prouty told me that he was of age, and could make as good a deed as he ever could. With regard to the bond made by A. T. Prouty, on which I went security, he told me that he had to give bond with security, or do worse. That bond was made at the court-house. A good many persons were present when it was made. The gathering at the court house, was in consequence of Prouty having entered the claim of Edgar. It was my understanding that the claim-club of the neighborhood, compelled A. T. Prouty to give that bond.

George Duly—I know the land in dispute in this suit. It was entered by myself, in the spring of 1849, if my memory serves me. Anson T. Prouty furnished me the money to enter it, and told me to enter it in the name of his son Joseph. He gave me the numbers. After I came back from the land office, I learned that it was a part of the respondent's claim. I heard both the complainant and his mother say, before he went to California, that he was of age.

Thomas J. Adamson—I know that the complainant executed a deed to the respondent, for the land in controversy. He made it on the day he passed through Newton, on his way to California. I heard him say that he had made it. On that day, he told me he was of age, and that he wanted to make the deed, so as not to get his securities into any trouble. The practice of the claim-club, where claims had been wrongfully entered, was to meet and make propositions—to get them back peaceably, if possible, but to get them back. After the bond and security was given, the excitement about the Edgar claim died away, and good feeling existed between the parties. I have reference to the bond given by A. T. Prouty and Evan Adamson, that James Prouty would make a deed to

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Edgar for the land, when he became of age. The claim was made eight years ago, I think. My father made the claim, and gave it to my sister, and when Edgar and her were married, he marked the claim out again. I helped him to do it.

The district court dismissed the bill, at the cost of the complainant, from which decree he appeals.

Hall, Harrington & Hall, and Loughridge & Cassidy,
for the appellant.

Anson Prouty, the father of complainant, caused the land in controversy, to be entered in the name of complainant. It was an advancement by the father to the son. The defendant claims no equities against the father, unless upon the bond. This cannot offset the rights of the son. If the advancement was made in good faith—and defendant cannot say that it was not—the bond having been given subsequent to the advancement—then the merits of this cause depend upon the equitable relations existing between Joseph Prouty and the defendant.

We think the evidence discloses sufficient fraud and duress, to justify a court of equity in cancelling the deed, but our argument proposes to be cumulative to the evidence, and upon the assumption that fraud and duress are not shown.

Joseph Prouty, at the time he executed the deed in question, was, in legal vernacular, *an infant*; immediately upon the execution of the deed, he goes to a foreign state; and, in about eighteen months after he becomes of age, sends his power of attorney, authorizing the institution of this cause. What is the force of that contract between the two parties? We think it void. Before we proceed farther, it may be well to direct your attention to a distinction, which we think has been drawn by the authorities, between cases in law and equity, where the same questions have arisen, as in this. In an action of ejectment, or for trespass, an individual cannot avoid a deed executed during

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his infancy, unless he has, by some "notorious" act, invalidated the deed since he became of age. In such cases, the question of title is involved, and neither party, by his pleadings, notifies the other of the grounds upon which they claim; and to avoid a conveyance, which may have been acquiesced in for years, would be a surprise, and work extreme hardships. Even in these cases, doubts rest upon the authorities, whether infancy may not be shown to avoid the deed. But this cause is not to recover land, but to avoid that which is voidable. It is an application to a court of equity, in order to create the "notorious avoidance," which will invalidate the deed in controversy, should we bring an act of ejectment hereafter against defendant.

An infant's contract, except for necessities, is neither void nor valid—but voidable. It is as distant from being "valid" as from being "void," and requires as defined, clear and distinct a ratification, to make it valid, as it does avoidance, to make it void. The act, whether to ratify or invalidate, must be an act, not a mere omission. It is said the act of avoidance must be as notorious as the contract sought to be avoided; a mere admission or acknowledgement of the contract, is not sufficient. Comyn on Cont., 794; 1 Parsons on Cont., 269. So must the ratification be equally notorious. The mere fact that an infant does not, after he becomes of age, disaffirm a contract, is not of itself a confirmation. 2 Parsons on Cont., 271. It requires other circumstances in addition; in other words, the mere omission or acquiescence is not a ratification.

In *Jackson v. Carpenter*, 2 Johns., 539, the same questions, as to the force of a deed, were involved as here, and are clearly and distinctly adjudicated. A mere acquiescence of a person in a deed, for ten years after he becomes of age, was held not to be a ratification. "It would be contrary to the benign principles of the law, by which the imbecility and indiscretion of infants are protected from injury to their property, that a mere acquiescence, without any intermediate or continued benefit, showing his as-

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sent, should operate as an extinguishment of his title." The same doctrine is asserted in *Jackson v. Burchin*, 14 Johns., 124. In *Bool v. Mix*, 17 Wend., 120, the same principles are recognized, though it is said in this case, referring to the cases of *Carpenter & Jackson v. Burchin*, that had the land in controversy been held by adverse possession, this fact, together with the long acquiescence, would have been deemed a ratification.

The cases above referred to, contain within them, many citations to others, which assert the same doctrine. In the last case we have quoted, we find a remark, in the opinion of the court, which bears with double force upon the case before us: "Deeds procured by duress, or executed by persons of unsound mind, stand upon nearly the same footing as infancy." In the present cause, infancy and fraud, or its elder brother, duress, are shown. The remainder of the opinion goes on to show that, before a suit can be instituted to recover the land, or the person holding under such deed from an infant, can be considered a trespasser—the infant, having become of age, must, by an act as notorious as the deed, disaffirm the deed. This is all true, and herein is the distinction between such cases and this cause. Those are suits to recover the land—action in law—this, to avoid and cancel a voidable contract, by application to a court of equity—and in regard to wild lands, subject to no such adverse possession, as is contemplated in law. This is the notorious disaffirmance which, as we have before said, would, in an action at law to recover the land, be a complete avoidance of the contract.

It has been said, in defining what such a "notorious" act as disaffirms the contract, would be, that to give, and put upon record a deed to another person, comes within the definition. If, then, the deed sought to be annulled, be not cancelled, for the reason that this complainant has not, in a sufficiently notorious manner, revoked his deed to Edgar, the door is only opened for more litigation, and complainant must put upon record his deed to "A.," who will be enabled to recover at law. If this be an objection

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to the present bill, that it does not allege this notorious revocation, it must be raised by demurrer; and we can scarcely think a demurrer would be sustained, which alleged that there was no equity in the bill, because complainant had not done that which, in his bill, he seeks to do—avoid a voidable contract. This is the “notorious revocation” required to avoid at law. In *Sucker v. Moretana*, 12 Curtis, 21—a later case—the doctrines of the forgoing cases are asserted and affirmed. See, also, *Lessee of Drake v. Ramsey*, 5 Hammond, 251; Parsons on Confs., 272, and notes and cases therein referred to.

The positions we seek to establish, are so fully recognized and asserted in all the authorities, that we refrain from making more citations. We find no authority where the circumstances of the cause have so many forces tending to make void the contract. A “claim-club” not only imposing upon, but absolutely forcing and driving “the imbecility and indiscretion of an infant” into a contract, never can extinguish his title, merely because he has acquiesced for a year and a half in the outrage they committed upon him. Force, duress and fraud, are things which time cannot cure. And equity jurisprudence, goes still further. An infant, who, after he becomes of age, but is ignorant of his rights, affirms a contract made during his minority, can obtain relief against such contract. Especially where the parties with whom he contracts, knew what his rights were.

This cause, then, being for the purpose of avoiding a voidable contract, which was forced upon complainant—and this is *prima facie* proven by the fact, that it was without consideration—we think, a court of equity will not hesitate a moment to cancel the deed, even if it were a mere voluntary conveyance; much less, where it was obtained by duress.

E. W. Eastman, for the appellee.

The defendant contends: 1. The evidence does not estab-

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lish any duress, but does show a voluntary conveyance; 2. The plaintiff never owned the land, but was the trustee of Anson T. Prouty, if he had any title; 3. The plaintiff was not an infant when he executed the deed; 4. The plaintiff is bound by the deed, even though he was an infant: *First*, By his own fraud; *Second*, By not refunding what he has received.

I. There is no evidence tending to show any compulsion upon plaintiff, except that of Henry Rogers, and that is entirely contradicted by that of Evan Adamson and Jesse Rickman. The plaintiff had not executed either of the bonds, or been even consulted, unless, by his father, about the matter, till he came to Adamson and inquired for the defendant, and said he desired to make the deed. The deed was made at his own suggestion. I deem it useless to argue this part of the case any farther.

2. The plaintiff never owned the land in dispute, but held the title, if he had any title, in trust for Anson T. Prouty. If plaintiff was in fact a trustee of A. T. Prouty, it matters not whether he was of age or not, for a minor is competent to be an agent or trustee. Story on Agency, sections 7 and 8; 1 Blackstone, 465; 1 Bouv. Inst., 231; 2 Ib., 3. If plaintiff was a trustee, he could be compelled to execute a deed. "Whatever an infant is bound to do by law, the same shall bind him, though he do it without suit." 2 Greenleaf's Cruise, Title 32, section 13.

Though the land in dispute was entered at the land office, in the name of plaintiff, yet there is not sufficient evidence to vest the title in plaintiff. 1. There is not a sufficient delivery of title and possession; 2. There is not a sufficient acceptance of the property by plaintiff; 3. The plaintiff never paid any consideration for the property. The evidence is that A. T. Prouty gave fifty dollars to witness, Duly, and directed him to enter the land in plaintiff's name, which he did, and on his return, gave the duplicate to said A. T. Prouty. There is no evidence that plaintiff had any knowledge that the land was entered in his name, until after A. T. Prouty gave his penal bond to

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the defendant. And there is no evidence that the duplicate was ever delivered to plaintiff. This duplicate is by statute, (Code, section 2435), made evidence of title. The delivery of the duplicate, in this case, amounts to the same thing as the delivery of a deed. And, as there was no consideration paid, there certainly could be no title or interest in the estate, without a delivery of title papers.

“Every conveyance requires two parties; namely, a grantor, or giver, and grantee, or receiver; and two acts, namely, the grant or gift, and the acceptance of it. The property may be offered to another to become his, if he will have it, but until he accepts it, the title remains in the former owner unchanged.” “When there is no duty, it seems difficult to maintain that the estate passes out of the grantor immediately upon the formal execution of the deed, in the absence, and without the knowledge of the grantee.” 2 Greenleaf’s Cruise, Title 32, note to section 25, by Mr. Greenleaf. In the celebrated case of *Thompson v. Leach*, 2 Vert., 198, it is said that “a man cannot have an estate put into him in spite of his teeth.” Though the title in this case may have passed to plaintiff, (of which there is a doubt, as I will show), yet the *estate* did not pass without a delivery of the title papers, and the acceptance of the estate.

In the case of *Harrison v. The Trustees of Phillips Academy*, 12 Mass., 461, it is said: “It is very certain that until the deed was accepted by Harrison, the title of the estate had not passed out of Holden, [the grantor], for no man can make another his grantee, without his consent, and a deed made to a man, with all the requisite formalities, and even entered in the public register, would be null, if not afterwards accepted by the grantee.”

Again in *Maynard v. Maynard*, 10 Mass., 456, the father executed a deed to his son, and put it on record. In about a year after the son, who lived with his father, died, and the father got the deed from the place of deposit, and claimed the land. The court said, “We are satisfied the title never passed out of the demandant, and that there-

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fore, he is entitle to recover." See, also, "Additional Notes," at the end of that case, in late editions. There was, therefore, neither a delivery nor acceptance in this case, sufficient to pass the estate to plaintiff. He never received the duplicate, and never by any act accepted of the estate, till he commenced this suit.

But as the duplicate, which is made evidence of title, was executed by a third party, instead of the father, (A. T. Prouty), it may be that the court will hold that the title passed to plaintiff. If so, then the estate did not pass, but plaintiff held it in trust for A. T. Prouty, till he made the bond to defendant, and from the time that defendant paid the sixty dollars, he held it in trust for defendant. The fact that plaintiff voluntarily executed the deed, as required by the bond of A. T. Prouty, is presumptive evidence that plaintiff then believed that he held the title in trust for defendant, for "the presumption is, that people act honestly." An after acceptance cannot revert back, so as to affect "intervening rights." 12 Mass., 461. The plaintiff paid nothing for the land. A. T. Prouty paid the money. "Where land has been purchased in the name of one person, and the consideration given or paid by another, there is a resulting trust in favor of the person who paid the money." 1 Greenleaf's Cruise, Title 12, sec. 42; 4 Kent, 305, margin; 2 Story's Eq., sec. 1201; 2 Bouv. Inst., 326; 1 Greenleaf's Ev., sec. 266.

It may be said that this was an advancement by the father to the plaintiff. "Whether a purchase by a father, in the name of his infant child, is to be deemed an advancement to the child, or a resulting trust to the father, is a question of intention, susceptible of proof by parol testimony, when such testimony is not contradictory to the deed." 1 Greenleaf's Cruise, title 12, 380, note (1) by Mr. Greenleaf. The intention, in this case, clearly appears from the acts of the father. He paid the money, and received and retained the duplicate, and sold the property, and gave his bond for a deed. The title was never delivered by him. And even though the evidence might not

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be sufficient to compel the plaintiff to convey to A. T. Prouty, yet it is certainly sufficient for the court to refuse to require the defendant to convey back to plaintiff, after his solemn admission by his act of conveyance, that he held the land in trust. In the case of *Jackson v. Matadorf*, 11 Johns., 91, the father purchased a farm and caused it to be conveyed to his daughter, "for the purpose of avoiding some expected difficulties to the father." It was held not to be an advancement to the daughter, but a resulting trust to the father. In the present case, the defendant had a "claim" upon the land, which was a legal subsisting interest in it at the time it was entered. See *Hill v. Smith*, Morris, 70; *Freeman v. Holliday*, Ib., 80; *Zickafosse v. Hulick*, Ib., 175; *Wilson v. Webster*, Ib., 312; *Hughell v. Wilson*, Ib. 383; *Starr & Burgess v. Wilson*, Ib., 438—and the noted case of *Cunningham v. Deperd*, Ib., 463. This claim of defendant, made the act of A. T. Prouty a species of fraud, to cover up the ownership.

III. The plaintiff was not a minor. The evidence on this point is conflicting. It consists of the declarations of the family—the report in community—the deposition of the mother, and the declarations of defendant. "The party alleging infancy must prove it." 1 Greenl. Ev., section 81; 2 Ib., section 362. "An infant's age may be proved by his own declarations." 2 Greenl. Ev., section 363. An infant is bound by his representations. 6 N. H., 349. There is not sufficient evidence in this case, for the court to find that the plaintiff is not of age, which the court must do, to set aside the deed and decree of the district court. We have the positive and voluntary declarations of plaintiff, that he was of age, in addition to family talk, which will certainly more than balance the evidence of that feeble old woman, over seventy years of age, and who has, at former times, in comparing the age of plaintiff with others, given him a different age.

IV. But even if it were admitted that the plaintiff owned the property, and was a minor, he is bound by his deed. A contract of an infant is not void, but is either

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binding or voidable. 13 Mass., 239; 2 Kent, 234; 2 Greenleaf's Cruise, Title 32, 18, 19; American Leading Cases, 116. "An infant is bound, in equity, by a contract made through his fraud. 1 Blackst. Com., 466, latter part of note 17; 9 N. H., 448, and cases there referred to; 1 Kinney's Law Comp., 202, 422, 463; 6 N. H., 349. No person will be allowed to allege his own fraud, to avoid his own deed. 2 Greenleaf's Cruise, Title 27, 497. "If a man stands by and sees his property sold, and signs his name as a witness, he is bound by the sale. This applies to women and minors." 1 Story's Eq., sec. 385; 2 Kent, 240, note (1). The plaintiff in this case did not exactly sign as a witness, but he executed the deed, which is about the same thing. It admitted the right of A. T. Prouty to sell it. If the plaintiff was an infant, as he now alleges, then by his fraudulent representation, he obtained from the defendant the bond of A. T. Prouty, and E. Adamson, which was his evidence of payment for the land, and the basis of his right to enforce a title or recover damage.

It may be said that plaintiff never received any consideration for this land, which Rogers said was worth two hundred dollars. To this, I reply, first, that Rogers' evidence is not competent. He testified to the value at the time the deed was made, and not at the time the first bond was made. All of the value of the land at the time it was entered, over \$1,25 per acre, belonged to defendant. It was his "claim," or improvement. He was in possession of the land by the invitation of the government, and could not be ousted from it until he had been paid for his improvement. *Hill v. Smith et al.*, Morris, 76; *Pierson v. David et al.*, 1 Iowa, 28; *Thredgill, Adm'r, v. Goodloe*, 12 Howard, 36; *Bush v. Marsh*, 6 Howard 290. This was a case from Iowa. A. T. Prouty, therefore, could not, by his purchase, divest the defendant of his interest in the land, and of course could not vest a perfect title in the plaintiff. The sixty dollars, therefore, may be deemed a full consideration for the land. From these facts, this court cannot find that there ever was a

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perfect title in plaintiff. If plaintiff had a real interest in the land, the sixty dollars was received in trust for him, and by making the deed he confessed it. But an injury to the grantee, is as good a consideration as a benefit to the grantor. The plaintiff received the defendant's bond, and passed it over to the makers. This was an injury to the defendant. Again, a consideration moving from a third person, is as good as one direct from the grantee, and such conveyances are usual.

"A minor must refund the money he has received, before he can rescind his contract." 15 Mass., 363; 1 N. H., 75; 6 N. H., 338; 12 Verm., 28; 21 Ib., 495; American Leading Cases, 116; 7 Cowen, 182; Story on Contracts, sec. 42; 2 Kent, 240, (margin); 17 Wend., 119; Code, sec. 1488; 4 Blackf., 240; 1 Bouv. Inst., 230. The plaintiff has not refunded, nor offered to do so, in this case. He holds the sixty dollars, the bond, and the two hundred acres of land. To use a quaint saying, he "has carried off the mill and is now back after the dam." Is he entitled to the land, and the pay for it? See *Cunningham v. Deferd et al.*, Morris, 465. The plea of infancy was designed as a shield to protect the rights of infants against their own indiscretion, and the deception of dishonest men. It was never designed as a sword to attack the rights of others. The most of the cases of avoiding contracts made by infants, are cases at law. The law will not hold an infant to his contract which is injurious to him; neither will equity assist him to wrong others. The maxim that "he who asks equity, must do equity," is as applicable to infants as to adults. There are many cases in which courts of equity will not compel an infant to perform his contract, yet when he has performed it, the court will not assist him to rescind it.

"The court of chancery will not lend its aid to carry a deed into execution, unless it is supported by some consideration. For equity is remedial only to those who come in upon an actual consideration. So that, although a voluntary conveyance which is good in law, is sufficient like-

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wise in equity; yet a voluntary defective conveyance, which cannot operate at law, is not helped in equity in favor of a bare volunteer, when there is no consideration expressed or implied." "There must not only be a consideration in equity, as a motive for relief, but it must be a stronger consideration than what is on the other side. For, if it is only equal, then the balance will incline neither way, and the court will not interfere. Thus, where there are two conveyances, without consideration, of the same land, the court of chancery will not relieve the latter against the former, so that he who has the legal estate will hold it." 2 Greenl. Cruise, Title 32, sec. 39; 1 Story's Eq., sec. 433; 2 Ib., sec. 787. "The same rule is applicable to imperfect gifts—to imperfect voluntary assignments of debts and other property—to voluntary executory trusts—and to voluntary defective conveyances." 2 Story's Eq., sec. 793.

In this case, there was no question by A. T. Prouty, or any one else, that plaintiff owned the land. They treated plaintiff as trustee. There was at most only a "defective conveyance" to plaintiff, for plaintiff had paid nothing, and had not received the title papers, and has never had possession of the duplicate, and has not shown by the records of the recorder, as required by the Code, (sec. 1488, 1489,) that the land was even entered in his name. The plaintiff, then, by his voluntary conveyance, admitted that he was a trustee of A. T. Prouty, and thus made it the conveyance of A. T. Prouty. The fact that defendant and A. T. Prouty were ignorant of the law, that a minor could be a trustee, and that his deed would be good, cannot affect the equitable rights of defendant, nor give plaintiff any better title than he can prove by the record, that he received and accepted, before the bond of A. T. Prouty was executed.

Samuel A. Rice, on the same side, in his argument, cited the following authorities: *Pinchard v. Brown*, 4 N. H., 399; 3 Ib., 173. *Sullivan v. McLenans*, 2 Iowa, 437; *Adams Eq.*, 305; margin, 143; 8 N. H., 193; *Sugd.*

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Vend., 414; Spencer's Eq., 194; 1 Johns. Ch., 261; 2 Story's Eq., 789; 7 Vesey, 264; 2 Johns. Ch., 537. *Storrs & Brooks v. Barker*, 6 Ib., 166; 1 Story Eq., sec. 385; 2 Spencer's Eq. Jur., 32; Story on Agency, sec. 7 and 8; 1 Black., 465, margin; Bingham on Inf., 11; 2 Kent, 234; 13 Mass., 239; 1 Am. Lead. Cases, 104; 1 Iowa, 380; 9 N. H., 449; Bacon's Abridg. Inf., 3; 2 Vesey, 212; 1 Brown's Ch., 358; Fonb. Eq., 80, note g; 2 Vern., 224; 3 Burr, 1802; 12 Searg. & R., 399; 12 Verm., 28; 3 Edw. Ch., 222; 15 Mass., 363; 1 N. H., 75; 6 Ib., 338; 12 Verm., 475; 2 Iowa, 114; 1 How., 231; 13 Vesey, 140; 1 Greenl. Ev., sec. 103.

STOCKTON, J.*—There is no evidence that the complainant was compelled to execute the deed of conveyance to defendant, by force or duress, or that it was obtained from him by any fraud, covin or misrepresentation. The allegations of the petition in these particulars, are wholly denied by the answer, and are not sustained by the evidence.

If complainant was an infant at the time of executing the deed, of which fact some doubt may be entertained, upon an examination of the whole testimony, there can be no doubt that he represented himself at the time, to be of full age, and that defendant, from these representations to himself and to others, had good reason to believe him to be of full age. On the day the deed was executed, the complainant sent word to defendant, that he wished to make the deed; that he was of full age; and could then make as good a deed as he ever could. Under such circumstances, it is not permitted to complainant to disaffirm his contract. Code, sec. 1489.

But complainant never had any beneficial interest in the land. It is shown, beyond all controversy, that the money

* WRIGHT, C. J., having been of counsel, took no part in the decision of this cause.

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to purchase it, was furnished by Anson T. Prouty, the father, with directions to have the title taken in the name of the son. It was taken in his name accordingly, and complainant admitted to one of the witnesses, that this was done “to *devil* Edgar, or to put him to some trouble, anyhow.” The complainant was but the trustee of Anson T. Prouty, holding the title of the land for his use and benefit. Edgar had purchased the land of the father, and paid him for it. When the time came for the execution of the deed, it was found that the title was in the son, and he was a minor. When this fact became known, the testimony is, that the “claim-club” met, and compelled Anson T. Prouty, the father, to give bond and security for the conveyance of the lands by complainant, when he arrived at the age of twenty-one years. The father said to the witness, that in consequence of his having entered the defendant’s land, “he had to give the bond, or do worse.” If there was any duress, it was in requiring Anson T. Prouty to give this bond. This, however, is not a matter of grievance to the petitioner, and he cannot, in any manner, take advantage of it, to invalidate the conveyance made by him to defendant. He was only the depository of the title, holding it for the father. Having made the conveyance, his connection with the matter was at an end. Anson T. Prouty should have sued to set aside the sale and conveyance to defendant, whether for the duress in obtaining the bond, or for the infancy of complainant, at the time of the execution of the deed.

There is nothing on which complainant can base any claim whatever to the land. Holding the title as he did, for the benefit of his father, who had sold the land to defendant, and received the purchase money, we do not see how, even if his infancy was conclusively established, he could have resisted the claim of defendant for the conveyance of the legal title. He would have been required in equity to convey. “Whatever an infant is bound and compellable to do at law, the same shall bind him, although he does it without suit. Therefore, where an in-

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fant re-conveyed lands, which had been mortgaged to his father, the mortgage money having been paid off, the conveyance was held good." 4 Greenleaf's Cruise on Real Property, Title 32, ch. 2, sec. 13. *Zouch v. Parsons*, 3 Burrows, 1794; 2 Kent's Commentaries, 234. So, where a father had purchased land in the name of his infant son, for the purpose of defrauding his creditors, and had afterwards sold the land to a purchaser for a valuable consideration, and the infant had, at the father's instance, conveyed the legal title to the purchaser, it was held that he could not, after age, avoid his conveyance, because, though the legal title was cast upon him by the fraudulent conduct of his father, he had no right to the land against a creditor or purchaser; and therefore, when he conveyed to the purchaser from his father, he merely parted with the naked title, and only did that which a court of equity would have compelled him to do, and which, if disaffirmed, he would be compelled to do again. *Elliot v. Horn*, 10 Ala., 348; 1 American Leading Cases, 249.

Decree affirmed.

HELFENSTEIN & GORE v. CAVE.

Where a party claims a homestead in lands used for agricultural purposes, under the act entitled "An act to exempt a homestead from forced sale," approved January 15, 1849, he must allege and show that the homestead claimed, does not exceed the forty acres given by the statute; that it is not included in the recorded plat of a city, town, or village; and that it does not exceed five hundred dollars in value.

In a plea of homestead, under the homestead act of 1849, it is not necessary to allege that the defendant notified the officer, at the time of making a levy upon the land, of what he regarded as a homestead, or that he claimed such homestead.

In an action of right, where the defendant claims the premises as his homestead, under the homestead act of 1849, the defendant may plead that the premises are susceptible of a division, so that a portion, including the dwelling house and buildings appurtenances thereto, may be set off in such manner that the homestead will not exceed the sum of

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five hundred dollars ; and in such a plea, it is not necessary to set out new limits to the homestead, in order to bring it down to the necessary value.

Under such a plea of homestead, it is incumbent upon the plaintiff, either to deny that the premises are divisible, or to call for a survey of the premises, and the ascertainment of a quantity of the land, to meet the required value.

Appeal from the Van Buren District Court.

TUESDAY, JUNE 22.

Action to recover certain real estate, consisting of a tract of land and the appurtenances, with damages for the detention thereof. The plaintiffs recovered judgment against one Wyman and the defendant Cave, as parties, at the September term of the district court, for the year 1851. An execution, issued under this judgment, was levied upon the real property in question, and it was bought by the plaintiffs, who now sue for possession. The defendant answered, pleading that the land and appurtenances so levied on, constituted his homestead, at the time when the promissory note was given, upon which the said judgment was recovered, and that the same was, therefore, not subject to levy and sale. The answer consists of six counts, setting forth the claim of homestead in various manners, which are sufficiently shown, as well as the objections made to them, by the demurrer and the opinion of the court.

The plaintiff demurred to the counts of the answer severally, except the first, as follows : To the second count : 1. That there is no allegation that the property claimed, does not exceed five hundred dollars in value, and the answer claims the whole property as exempt ; 2. That there is no allegation that defendant made any claim of homestead of the sheriff, or gave any notice of any claim of homestead at the time of attachment, levy or sale, or that the purchaser had any knowledge of such claim. To the third count : 1. That there is no allegation that defendant made

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any claim of homestead of the sheriff, or gave any notice of such claim at the time of attachment, levy or sale, or that purchaser had any knowledge of such claim. To the fourth count: 1. That there is no averment that the property does not exceed five hundred dollars in value. To the fifth count: 1. The same cause as the fourth. To the sixth count: 1. That it does not show what portion of the property was, and is, exempt from execution, and does not specify, by proper description, what he claims as a homestead.

The demurrer does not cover the first count. The court sustained it as to the first cause assigned to the second count, and as to the fourth and fifth counts—to which ruling the defendant excepted; and the court overruled it as to the second cause assigned to the second count, and as to the third and sixth counts, to which ruling the plaintiff excepted. Both parties appeal.

Charles C. Nourse, for the plaintiffs.

Knapp & Caldwell, for the defendants.

WOODWARD, J.—It is a familiar and well established rule of pleading, that when a statute gives a new right or privilege, under certain circumstances, conditions or qualifications, the party claiming such right in his petition, or setting it up as a defence in his answer, must bring himself within the requirements of the statute; in other words, must, in his pleading, show that he comes within the circumstances, or possesses the conditions or qualifications named by the statute as requisite for holding the right or privilege. In the case of a homestead, that given by the statute in a town, and held for usual town purposes, differs in quantity from that given in lands held for agricultural purposes. The case at bar is a claim of a homestead of the latter kind. Therefore, the party claiming must show, that the homestead claimed does not exceed the forty acres given by the statute; that it is not included in the record-

ed plat of a city, town or village, or, in other words, that his claim applies to agricultural lands, and not to a town lot; and third, that it does not exceed five hundred dollars in value—this claim being made under the act of January 15, 1849. Statute 1849, 150.

The district court appears to have adjudicated this case, under the above rule, and to have held those counts of the answer insufficient, in which all of the three conditions above named are not averred. Thus, the second, fourth and fifth counts, omit the allegation that the homestead claimed, does not exceed five hundred dollars in value, and therefore, the demurrer thereto is sustained. But the third and sixth counts contain the necessary averments, touching each of the above conditions, and, therefore, the demurrer is overruled as to these. Thus far, we think, there was no error, for the rule first stated is applicable to the case. See same case, 3 Iowa, 288.

But there are one or two other points made by the demurrer. To the second count of the answer there are two objections stated, the second of which is, that there is no averment that the defendant made a claim of homestead of the officer executing the writ, or that he notified the officer that he claimed such homestead. This allegation is not made in the third count, either, but the objection is not taken here. The averment is, however, made in the fourth, fifth and sixth counts. Was it necessary to the validity of the second? We think not. Trying the question by the rule first suggested, it was not requisite, because in the section or clause giving or creating the right claimed, there is no requirement upon the subject of notifying the officer. And viewing it upon wider grounds, it would not seem requisite that a notice to the officer should be pleaded. If this should be required, it must be upon the ground that it must be proved, and so that it is essential to the assertion of the right; and we are not prepared to say that such notice is of vital consequence. The statute is not explicit, nor is it clear upon the point of making known the claim of homestead. It is a matter of course, that it must be

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made known at some time, and in some manner, but as the case does not demand it, we do not attempt to lay down a rule.

The statute provides that when a levy is made upon lands, in which the homestead has not been selected and set apart by metes and bounds, the householder may notify the officer at the time of making the levy, of what he regards as his homestead, with a description thereof. Then, so far as regards the question of pleading, as applied to this particular count, (the second), it does not appear in the answer, whether the homestead had been selected and set apart; and therefore the demurrer does not reach the point.

This leads to the remaining question, which is made by the demurrer to the sixth count. The cause assigned is, that this count does not set up and show what portion of the property is claimed as a homestead. We have before remarked that the statute is not specific in its provisions in relation to the owner's defining and claiming his right, and that, in the nature of the case, it is necessary that it should be done at some time. If it is not done before, it must be done, at least, in an action brought, as the present one is, to recover the property, by the creditor who has levied upon it. That is, this must be done where the homestead would cover but a portion of the land levied on; but if the claim of homestead covers all the property so taken, it would seem that the pleading was specific in applying the claim to the property sued for, and described in the petition. But this is not the position of the sixth count of the answer. This does not plead that the thirty-five acres are not worth over five hundred dollars, but avers that they are susceptible of a division, so that a portion, including the dwelling house and buildings thereon, could be set off in such manner that it would be worth less than that sum.

The plaintiff demurs to this, because it does not specify what portion of the land he claims as a homestead. Throughout the former part of his answer, the defendant

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has claimed the whole of the land levied on, as exempt, and this count is not to be understood as waiving this. It is but another plea, claiming that, if it should be found that the land is of a greater value than five hundred dollars, then it is capable of being reduced to a quantity which shall not exceed that value. Or, taking another view, he pleads that at the time of the levy, and before the sale, he notified the officer that he claimed the whole as a homestead, implying that, according to the statute, if the plaintiff dissented from this claim, because the land was of too great value, he should cause it to be surveyed and reduced. The defendant may plead so as to lead to an ascertainment of these facts, and a reduction of the quantity, so as to reach the value allowed; and when he is seeking to do this, having first asserted a claim to the whole, as being within the lawful bounds, we do not think he is obliged to set out new limits, in order to bring it down to the necessary value, and thus possibly jeopardize his whole right, by forming an issue on a question compounded of quantity and value. And farther, it is inconsistent that he should do so; for he has just averred that the whole does not exceed the proper value, and he cannot now be held to say that thirty acres, or twenty-five, are of the same value.

The statute is indefinite, and does not direct the proceedings in detail, and they are to be defined in the light of the leading object of the statute, and of those particulars which are given. Under such light, therefore, as there is, we are inclined to think that, when the matter has arrived at the present stage of this case, it is incumbent upon the plaintiff to make a move, by either denying that the property is divisible, or by calling for a survey, and an ascertainment of a quantity to meet the required value. This he might have done out of court, and we think he must be permitted to do it while his suit is pending. This must be so held, or else he must be considered as waiving the point of value, by not dissenting before the sale, when notice was given of the claim of homestead. And as the

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matter of the plea is considered good on the defendant's part, this step must be held good on the part of the plaintiff.

Under these views, we hold that the demurrer of the plaintiff to the sixth count of the defendant's answer, was properly overruled. Wherefore, we do not find that there was error in the judgment, nor in the rendition thereof, and the same is affirmed.

Judgment affirmed.

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THE STATE OF IOWA v. HINKLE.

It is only where a grand juror has formed or expressed an *unqualified* opinion, that the defendant is guilty of the offence for which he is held to answer, that he is disqualified from serving, if objected to on that ground, under section 2884 of the Code.

Where a party held to answer for a criminal offence, at the time of empanneling the grand jury, asked a juror whether he had not formed or expressed an opinion as to his guilt, to which the juror answered that he had, and thereupon the juror was challenged as incompetent; and where the court then asked the juror, whether he had formed or expressed an *unqualified* opinion of the guilt of the defendant, to which the juror answered that he had not—that his opinion was based upon rumor, upon which the challenge was overruled; *Held*, That the juror was not disqualified.

Where a party has been held to answer for a criminal offence, he cannot, after indictment found, object to the manner in which the grand jury had been selected and drawn.

Where on the trial of an indictment, in which the defendant was charged with the murder of his wife, committed by means of strychnine, the State introduced two witnesses, one of whom testified to certain improper conduct between the prisoner and a female named F., prior to the death of the wife, and on the day of the burial—and the other testified, that after the death of the wife, and when the prisoner was in jail, he asked him if he did not get arsenic to kill the rats, to which the prisoner answered, that he did; that witness then asked him, “where?” to which the prisoner replied, “it is none of your business”—which evidence was objected to by the defendant, but admitted by the court; *Held*, That the evidence was properly admitted.

Where evidence *tends* to prove the issue, or forms a link in the chain of

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proof, however slight or remote may be its bearing, it is admissible. So, when material, evidence as to the knowledge and intent, or motive of a party, is always admissible.

The means of knowledge of an expert, are proper to be considered by a jury, and they should give or withhold credence in the opinion given, as they may believe the expert qualified to speak more or less intelligently and understandingly.

Where two physicians, S. and F., were called as experts, to testify as to the tests applied in the chemical analysis made of the stomach of the deceased, and of the tests usually applied for detecting the existence of poison in such cases, and one of them stated that he was not a professional chemist, but understood some of the practical details of chemistry; that portion, at least, which pertained to his profession; that he had no practical experience in the analysis of poisons, until, in connection with F., he analysed the contents of the stomach of the deceased; that since that time, he had conducted experiments on a small scale; and that he was previously acquainted with the means of detecting poisons, and had since had some experience in that way; and where the other testified that he was not a practical chemist; that he did not follow the science as a profession; that he understood the chemical tests by which the presence of strychnine can be detected; that he professed to understand the principles of chemistry as taught in the books on that science; that he never experimented with a view to detect strychnine by chemical tests; that he had seen experiments by professors of chemistry; and that there was one test much relied on, the trial of which he had witnessed; and where the witnesses were objected to as incompetent, for want of the requisite professional skill, which objection was overruled; *Held*, That the witnesses were competent.

Appeal from the Appanoose District Court.

TUESDAY, JUNE 22.

The prisoner was indicted at the October term, 1856, of the district court of Davis county, for the murder of his wife, Nancy Hinkle. Upon his affidavit and motion, a change of venue was ordered to Wapello county; and afterwards upon his like application, in the Wapello district court, the venue was changed to Appanoose county, in the ninth judicial district. At the April term, 1858, of that court, he was tried, found guilty of murder of the first degree, and sentenced accordingly. To reverse this conviction, he prosecutes this appeal. For the errors as-

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signed and the material facts, see the opinion of the court.

Cassady & Crocker, for the appellant, cited *Goodwin v. Blatchley et al.*, 4 Ind., 438; *Dixon v. The State*, 3 Iowa, 417; Whart. Crim. Law, 299; 2 Russ. on Crimes, 772; 21 Pick., 515; 1 Greenl. Ev., 563; 3 Phil. on Ev., 173, note; Whart., 389.

S. A. Rice, Att'y. General, for the State, relied upon *Dixon v. The State*, 3 Iowa, 416; *Norris' House v. The State*, 3 G. Greene, 513; Code, sec. 2881.

WRIGHT, C. J.—In the examination of the case, we shall confine ourselves to the errors insisted upon by counsel in their argument, both because we take it for granted, that these are the material ones, and because those assigned, and not relied upon, are either involved in those examined, or are not sustained by anything found in the record.

And first, it is urged that the court erred in overruling the challenge of the defendant, to a member of the grand jury that found the indictment. It seems that the defendant had been held to answer for this offence, prior to the term at which the indictment was found, and at the time of empanneling the jury, he asked an individual juror, whether he had formed or expressed an opinion as to his guilt, to which the juror answered that he had. The court then asked the juror, "whether he had formed or expressed an unqualified opinion of the guilt of the defendant; to which the juror answered, that he had not—that his opinion was based upon rumor. The challenge was thereupon overruled.

The Code, (section 2884), provides that a challenge to an individual juror may be made, for the reason "that he has formed or expressed an unqualified opinion, that the defendant is guilty of the offence for which he is held to answer." We think the language of the section quoted, is very definite and clear, and settles this question in favor of the ruling by the court below. The juror first an-

swered, that he had formed an opinion that the defendant was guilty, but upon being further interrogated, he showed that this opinion was founded upon rumor, and that it was not unqualified. It is only where the juror has formed or expressed an unqualified opinion of the defendant's guilt, that he is disqualified from serving, if objection is made. The case of *Goodwin v. Blachly et al.*, 4 Ind., 438, cited by counsel, is unlike this in two important particulars. *First*: Because in that case, the juror was held to be disqualified, because he had formed an opinion on the merits of the case, on information derived from witnesses. Nothing of this kind is shown in the case before us. But the second, and conclusive reason is, that our statute has, in plain and unambiguous language, defined what opinion shall disqualify. The juror answered unequivocally, that he had not formed or expressed such an opinion; and that the opinion which he did entertain, was founded upon rumor. The statute has given the rule, and it is not for us to change it.

It is, in the second place, urged that the court erred in sustaining the objection made by the State, to what is styled the defendant's plea in abatement. It seems that after the indictment was found, the defendant filed his plea, setting up various objections to the manner in which the grand jury had been selected and drawn. To this plea the State demurred, and also filed a motion to strike it from the files. The defects, or errors complained of in the plea, are substantially the same as those considered in the case of *Dixon v. The State*, 3 Iowa, 416, and the position of the parties is substantially the same. In that case, the defendant had been held to answer, and had given bail; in this, the defendant had been committed for want of bail. It was there held, that objections of the character here presented, come too late, when presented after indictment found, if the defendant has been held to answer; and to the same effect is, *Norris House v. The State*, 3 G. Greene, 513. A further objection to the plea in this case is, that it refers to, and relies upon, matters not of record,

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and is not sworn to. This would render it defective upon demurrer. In this ruling of the court, therefore, we cannot say there was error.

The indictment charges that the murder was perpetrated by administering poison, to-wit: strychnine, to the deceased. On the trial, the state called a witness, who testified to certain improper conduct between the prisoner and one Melinda Fiske, prior to the death of his wife, and on the day of her burial. Another witness testified, that after the death of the wife, and when the prisoner was in jail, he asked him if he did not get arsenic to kill the rats, to which the prisoner replied that he did. Witness then asked him, where? To this, the prisoner replied, "it is none of your business." The testimony of both these witnesses was objected to, and the objection overruled; and this is the third error relied upon in the argument.

The position of the defendant is, that the testimony did not tend to prove the matter in issue, and was calculated to mislead and prejudice the mind of the jury. In this view, however, we cannot concur. The argument assumes that it is not necessary that evidence, when offered, shall bear directly upon the issue; but that it is admissible, if it tends to prove it, or forms a link in the chain of proof. And this, we understand to be the established rule. 1 Greenleaf Ev., sec. 51, a; 11 Shepley, 139; 2 Watts & Serg., 441; 2 McLean, 596; 17 Conn., 441; 4 Sm. & Mar., 312. Under this rule, collateral facts, or those which are incapable of affording any reasonable presumption or inference, as to the principal fact, or matter in dispute, are excluded. But we are not to exclude facts, because they may have happened before or after the principal transaction, and which may have no direct connection with it. It is frequently material to show the knowledge, intent or motive of a party—and evidence as to this knowledge or intent, is always admissible. So, in the case before us, it can be readily seen, that if the prosecution could establish the fact, that an improper intimacy existed between the prisoner and the girl Fiske, the jury could see a mo-

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tive for the commission of the offence charged. The testimony would tend to show, that the affections of the husband were alienated from the wife, and that he would, therefore, be more likely to desire her death.

We cannot see how the prisoner could possibly be prejudiced, by the testimony in relation to the purchase of the arsenic, or how, in any view, it could be improper. The prisoner might claim from the proof, that it was purchased for a proper purpose, and therefore tended to his exculpation, rather than to establish his guilt. If the jury took this view, it is manifest that he was not prejudiced. On the other hand, the State might reasonably claim, from the fact that the prisoner was purchasing other poisons, and refusing to state where he had obtained the same, that this conduct was inconsistent with his innocence. The proof, in cases of this character, is frequently made up of a chain of circumstances, and so it was in the present instance. This circumstance may have had but a slight, and even very remote bearing upon the question of the prisoner's guilt. Of its weight, however, it was for the jury to judge, and not for the court, if it tended, as we think it did, to lead the jurors' minds to a conclusion upon the issue joined. And we may add, that whatever hesitation we might otherwise have upon this question, is entirely removed, when, by reference to the instructions, we find that the mind of the jury was very carefully guarded against any possible improper influence from such testimony. In admitting this testimony, therefore, the court did not err.

Two physicians were called, and testified as to the tests applied in the chemical analysis made of the stomach of the deceased—and also of the tests usually applied for detecting the existence of poison in such cases. Both of them testified that they were practising physicians. One of them stated, that he was not a professional chemist, but understood some of the practical details of chemistry—that portion, at least, which pertained to his profession; that he had no practical experience in the analysis of poisons, until, in connec-

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tion with Doct. Francis, he analysed the contents of the stomach of the deceased; that since that time he had conducted experiments upon a small scale; and that he was previously acquainted with the means of detecting poisons, and had since had some experience in that way. The other testified that he was not a practical chemist; that he did not follow the science as a profession; that he understood the chemical tests by which the presence of strychnine can be detected; that he professed to understand the principles of chemistry as laid down in the books on that science; that he never experimented, with a view to detect strychnine by chemical tests; that he had seen experiments by professors of chemistry; and that there was one test much relied on, the trial of which he had witnessed. Defendant objected to these witnesses as incompetent, and now urge that they did not show themselves possessed of the requisite professional skill.

We think they were competent witnesses. It is, of course, desirable that great caution should be exercised in conducting experiments of this character, and that the most skillful professional aid should be secured. If conducted, however, by such as have not had experience, or by those who, though not practical chemists, give their opinions from knowledge derived from the books upon that science, such opinions would be entitled to less weight than if given by a practical chemist—he who bases his conclusions upon experience as well as books. The means of knowledge are proper to be considered by the jury, and they should give or withhold credence in the opinion given, as they may believe the expert qualified to speak more or less intelligently and understandingly. But to say that none shall be permitted to give their opinions, except those of the highest professional skill, or those who had given their lives to chemical experiments, would, in this country at least, render it impossible, in most cases, to find the requisite skill and ability. This seems to have been the view taken of the question by the court below. The jury was very fully and particularly instructed as to the weight to

Gallinger v. Vale, Adm'r.

be given to this character of testimony, and the considerations which should enter into their deliberations in weighing the same. We cannot conceive how the jury could, under the circumstances, have been misled, or the defendant prejudiced.

The remaining errors relied on, relate to certain instructions asked by defendant, and refused. They involve, however, the same question as that last considered, and do not seem to require further notice. We are thus, with more pain than difficulty, brought to the conclusion that this case must be affirmed.

GALLINGER v. VALE, Adm'r.

When the decision on the facts rests in the same mind which pronounces the judgment of the law upon the facts, the final judgment of the law is all that need be expressed in the record of the court, unless the court is requested, under section 1798 of the Code, to state the facts found and the conclusions thereon, in writing.

A judgment entry as follows: "On this day came the plaintiff, by H. H. Rannels, his attorney, and the defendant, by F. Semple, his attorney, and submitted this cause to the court; and the court being fully satisfied in the premises, it is ordered and adjudged that the judgment of the court below be reversed, and the plaintiff pay the costs herein. It is therefore ordered and adjudged that the defendant, John Vale, Executor, &c., have and recover of the plaintiff and his surety, &c., the costs of this suit, taxed at \$———," is sufficiently regular and certain upon its face.

Appeal from the Lee District Court.

TUESDAY, JUNE 22.

The plaintiff filed in the county court a claim against the deceased, Tomlinson, amounting to \$596, for personal property sold him in his life time, of which a bill of particulars is filed. The county judge found due the plaintiff the sum of \$440, with costs, at the May session, 1857.

Gallinger v. Vale, Adm'r.

The administrator appealed to the district court. In the district court there was an agreement signed by the counsel on both sides, that they "agree to submit the above cause to the Hon. Judge Claggett, after argument by counsel, on the following state of facts." Then follows a statement of facts—a receipt offered by one of the parties—and two agreements relative to taking the depositions of certain witnesses, which depositions are included in the transcript, and which agreements are dated June 8, 1857. Then comes the following judgment: "On this day came the plaintiff, by H. H. Runnels, his attorney, and the defendant, by F. Semple, his attorney, and submitted this cause to the court; and the court being fully satisfied in the premises, it is ordered and adjudged that the judgment of the court below be reversed, and the plaintiff pay the costs herein. It is therefore ordered and adjudged that the defendant, John Vale, executor, &c., have and recover of the plaintiff and his surety, &c., the costs of this suit," &c. The plaintiff appeals, and assigns for error the following:

1. The court erred in reversing the judgment of the county court; 2. That the district court had no authority to reverse the said judgment upon an appeal; 3. That the court erred in rendering judgment against the plaintiff, without having found against him on the issue joined.

J. M. Beck, for the appellant.

F. Semple, for the appellee.

WOODWARD, J.—The plaintiff claims that this record shows that the court did not try the cause anew on its merits, as should be done on an appeal, but that they decided it upon some matter of law, and that this was error. There is no bill of exceptions, nor other paper, nor any entry of record, showing a request for a trial, and a refusal by the court; nor is there anything explaining the proceedings farther than above set forth. But the plaintiff

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urges that "the record shows error, in not stating that the issue was tried; and that upon that issue a finding was had for the defendant;" and that the term "reversed" has a technical signification, applied to the hearing on the law only.

It appears to us that this record and entry is sufficiently certain and regular, until something more definite is shown against it. It contains and expresses the legal conclusion and result, after a hearing. The court tried the cause in the place of a jury. They were not requested to express their finding on the facts, in writing, under section 1793 of the Code. We are not prepared to say, that it is essential that the record should, in such case, express that the finding is in favor of the defendant. When the jury renders a verdict, that fact appears necessarily, from the fact that the jury is a separate body. But in the present instance, the record entry is just what it would be after the rendition of the verdict of the jury—it is the judgment of the law upon the facts; and when the decision on the facts, rests in the same mind which pronounces the judgment of the law upon the facts, the final judgment of the law is all that need be expressed, unless a request be made under section 1793 of the Code.

We cannot say that there is anything in this record, which would warrant the court in saying, that the cause was not heard on its merits. If the party claimed a trial, and it was refused, a bill of exceptions was the proper method of showing this. It is true, that this judgment is not entered up in the usual and better form, and it is possible that it may amount only to a judgment of non-suit, but this forms no question before us. It is a sufficient final judgment in the cause.

Judgment affirmed.

Seachrist v. Griffeth et al.

SEACHRIST v. GRIFFETH *et al.*

Without a denial under oath, the plaintiff need not prove the execution nor assignment of a promissory note, in the first instance.

Where in an action on a promissory note, in the name of the assignee, the defendants deny the execution and assignment of the note, but the answer is not sworn to, the defendant may introduce evidence to sustain their denial. The effect of such an answer is to change the burden of proof from the plaintiff to defendant.

An answer in an action on a promissory note, which denies the assignment of the note, but is not sworn to, is not demurrable for that reason.

Appeal from the Warren District Court.

TUESDAY, JUNE 22.

The plaintiff declares on a promissory note, alleged to have been made by defendants to Baker & Co., and by them assigned to plaintiff. The action is brought against the makers and indorsers. The defendants deny the assignment of the note; but do not make the denial under oath. For this cause the plaintiffs demurred to the answer, and the demurrer was sustained. Leave was given the defendants to amend the answer. The assignors only answer over. There was a trial before the court, and judgment for the plaintiffs against the makers. The makers appeal.

P. Gad Bryan, for the appellants.

Lewis Todhunter, for the appellees.

WOODWARD, J.—The error assigned is to sustaining the demurrer to the answer. Under the ruling of this court in *Lyon v. Bunn*, ante, 48, this denial of the makers being without oath, would not warrant the sustaining of the demurrer, and thus holding the answer and denial wholly insufficient; but it changed the burden of proof from the plaintiff to the defendant. That is, the plaintiff need not prove the execution or assignment, in the first instance,

McMillen et al. v. The County Judge and Treasurer of Lee County.

without a denial under oath, but the defendants might introduce evidence to sustain their denial; but this ruling of the court held the answer wholly insufficient. They went to trial upon the other matters in their answer, and it does not appear that they offered evidence in relation to the assignment, but we consider that they were debarred from so doing by the decision of the court.

We are of the opinion, therefore, that there was error in the ruling and judgment of the court, and it is reversed.

McMILLEN *et al.* v. THE COUNTY JUDGE and TREASURER
OF LEE COUNTY.

6	391
128	432
6	391
140	172
140	178

The legislature possessed the power to enact the act "legalizing the issue of county, city and town corporation bonds in the counties of Lee and Davis." Statute of 1857, chapter 258. And that statute had the effect of legalizing the vote taken in Lee county in 1856, by which the people of that county determined to issue bonds and take stock in three several railroad companies, then constructing their roads through said county.

Where the legislature possesses the power to authorize an act to be done, it may by a retrospective act, legalize and declare valid, any informality or irregularity in the exercise of the power thus conferred.

The act "legalizing the issue of county, city, and town corporation bonds in the counties of Lee and Davis," (Statute of 1857, chapter 258), is not in violation of section six of the first article of the constitution.

Appeal from the Lee District Court.

TUESDAY, JUNE 22.

IN CHANCERY. The county of Lee, at an election held in 1856, by a majority of the votes cast, determined to issue bonds and take stock in three several railroad companies, then constructing their roads through said county. At the December term, 1856; of this court, said election

McMillen et al. v. The County Judge and Treasurer of Lee County.

was held irregular, and it was determined that, as conducted, it conferred no power upon the county judge to issue the proposed bonds. On the 29th day of January, 1857, the legislature passed "An act legalizing the issue of county, city and town corporation bonds in the counties of Lee and Davis." The county judge proceeded to take the stock and issue the bonds referred to in said votes and law. A tax was levied to meet the interest, as in said vote contemplated, and the petitioners, voters and tax-payers in said county, filed their bill, praying an injunction to restrain the collection of the same. Respondents demurred to the bill. This demurrer was sustained, the injunction dissolved, and complainants appeal.

F. Semple, for the appellants.

J. M. Beck and *J. C. Hall*, for the appellees.

WRIGHT, C. J.—The power of a county to take stock in a company, organized for the purpose of constructing a railroad, or other public improvement, through the same, has been recognized by a majority of this court, in the following cases: *Dubuque County v. Dubuque and Pacific Railroad Company*, 4 G. Greene, 1; *Leech v. Bissell, County Judge of Cedar County*, 4 G. Greene, 328; *Clapp v. Cedar County*, 5 Iowa, 15; *Ring v. Johnson County*, ante, 265. While I have never concurred in this ruling, and still deny the power, yet it may now, as I suppose, be regarded as settled. Assuming this much, I think but one question remains to be considered in this case; and that is, whether the legislature had the power to pass the act of January 29th, 1857, and did it have the effect of legalizing the vote taken.

The language of the law is, "that all votes heretofore taken in the counties of Lee and Davis, in the form of a joint or several proposition, whether said counties will aid in the construction of one or more railroads, specifying the amount to be given to each, as a joint or several proposi-

McMillen et al. v. The County Judge and Treasurer of Lee County.

tion, and the subscriptions made by said counties, and the bonds of said counties issued in pursuance of said votes and subscription, or hereafter to be issued, are hereby declared to be legal and valid; and that all such bonds issued, and hereafter to be issued, in pursuance of such votes and subscriptions, shall be a valid lien upon the taxable property of said county." It is also provided that the county judge, or other proper authority, shall levy and collect a tax to meet the payment of the principal and interest of such bonds; and that said counties shall not be allowed to plead, in any suit brought to recover the principal or interest of such bonds, that the same are irregular and invalid, in consequence of the informalities cured by said act. And, finally, all bonds issued by said counties for subscription to railroads, in pursuance of any vote of the people, are declared to be valid, and of full legal and binding force and effect, notwithstanding any informality or irregularity in the submission of the question to the vote of the people.

By reference to the case of *McMillen et al. v. Lee County*, 3 Iowa, 311, it will be seen that three propositions were submitted at the same time to the voters of Lee county, but that the subscription was not to be made to either of the companies, unless there was a majority of the votes cast in favor of each and all of them. This was held to be irregular, and it is this irregularity which was designed to be cured by the legislature. And it seems to me very clear, that if the legislature can authorize the counties to make such subscriptions, by a vote of the people, it can certainly legalize and cure any informality or defect in taking the vote. Having the power, the legislature could have authorized in advance, the county judge to submit the question as he did. He submitted it, however, in a manner not provided for in the law, and subsequently this submission is legalized and declared valid. I cannot see how it can change the matter, whether the power is given beforehand, or the informality cured subsequently. The right of the legislature to pass such laws, retrospective in

Sipe v. Finarty.

their character, cannot, as I think, be seriously questioned. The policy of such legislation is another thing, with which I have nothing to do. The case of *The City of Bridgeport v. The Housatonic Railroad Company*, 15 Conn., 475, is in point. See, also, 3 Dallas, 385; 8 Pet., 110; 2 Ib., 412, 661.

It is urged, however, that the act of January 29th, 1857, is unconstitutional. It is claimed to be so, because it legalizes the votes and bonds issued in Davis and Lee counties—does not embrace all the counties—and cannot, therefore, have a uniform operation throughout the State. The language of the constitution, (section 6, Art. 1), is that “all laws of a general nature shall have a uniform operation.” It will not be claimed, certainly that this law is of a general nature. And thus, we see that this objection is without foundation.

It is also urged that the curative act is not a law, but a legislative sentence, and that the constitution confers no power to thus legislate. The true inquiry, however, is, whether the exercise of the power is inhibited. In ascertaining the power of the legislature under the constitution, we look, not to what the instrument authorizes to be done, but to what is prohibited. In this case, there is no provision prohibiting, either expressly, or by implication, such legislation.

The other objections relate to the power of the legislature to authorize a county to make such subscriptions. For reasons before stated, I need not refer to these. While I concur in denying this power, I am of the opinion that it was perfectly competent for the legislature to legalize and make valid any informality or defect in the vote taken.

Decree affirmed.

SIPE v. FINARTY.

A premissory note, with a proviso as follows: “Provided that John C. Fremont has not a majority of six thousand votes at the ensuing elec-

Sipe v. Finarty.

tion, in the State of Iowa," is void under section 2724 of the Code. In order to sustain an action on such a note, the plaintiff cannot show that it was given for a full and valuable consideration.

Appeal from the Marion District Court.

TUESDAY, JUNE 22.

The defendant gave the plaintiff a promissory note of the following tenor: "On or before the first of December next, I promise to pay Jacob Sipe, or bearer, the sum of forty dollars, for value received; Provided, that John C. Fremont has not a majority of six thousand votes at the ensuing election, in the State of Iowa;" which note was dated October 18, 1856. In an action brought on the note before a justice of the peace, the defendant pleaded orally, that Fremont did have a majority of six thousand votes, at the said election, and therefore the note became void. The plaintiff recovered, and the defendant appealed to the district court. In that court, when the plaintiff offered the note in evidence, the defendant objected, and the court sustained the objection, and refused to admit it in evidence. The plaintiff then offered testimony to show, that the note was given for a full and valuable consideration. This being objected to, the objection was sustained. The plaintiff appeals.

George May, for the appellant.

Samuel A Rice, for the appellee.

WOODWARD, J.—At common law, gaming, unaccompanied by fraud, is lawful. But by a statute of this State, gaming and betting are expressly prohibited. Code, section 2724. And all promises and contracts, when any part of the consideration is money, or any valuable thing, won or lost on any game or wager, are absolutely void. In this case, the plaintiff seeks to recover upon a note, which, we

Quillan v. Windsor.

are clearly of the opinion is a betting transaction, and void. If the plaintiff claims to recover the value of the property delivered, he cannot do it in an action on the note, but must resort to an action for that specifically—granting that he can so recover, which we do not determine.

The judgment is affirmed.

QUILLAN v. WINDSOR.

To give the district court jurisdiction on appeal from a justice of the peace, it must be shown, either that the appellee had the notice required by the statute, or that he made a voluntary appearance in the district court.

Appeal from the Lee District Court.

TUESDAY, JUNE 22.

Trial and judgment before a justice, October 16th, 1856, from which defendant appealed to the district court, on the 26th of the same month. When the transcript and papers were filed with the clerk of the court below, is not shown, nor does it appear that they ever were filed. There is nothing to show that the plaintiff ever had notice of the appeal, nor that he appeared in the district court. The entry of judgment is as follows: "This cause now came on to be heard by the court, and the court having heard and inspected the case, finds for the defendant, and reverses the judgment of the court below," &c. The plaintiff appeals.

J. M. Beck, for the appellant.

W. E. Moss, for the appellee.

6	396
112	298
112	299
6	396
120	236

Quillan v. Windsor.

WRIGHT, C. J.—It is true, as claimed by the appellee, that the presumption is in favor of the correctness of the judgment below. But if the district court had no jurisdiction of the person of plaintiff, then all that was done was irregular, and the doctrine of presumption does not obtain. By such proceedings he would not be bound. To give this jurisdiction, it should be shown, either that he had notice of the appeal, as provided for in sections 2341-2 of the Code, or that he made a voluntary appearance. Nothing of this kind appears. The judgment is, therefore, erroneous, and must be reversed. *McCormick v. Bishop*, 3 G. Greene, 99.

[END OF CASES DECIDED AT THE JUNE TERM, A. D 1858.]

CASES
IN
Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF

THE STATE OF IOWA

DES MOINES, DECEMBER TERM, A. D. 1858.

In the Thirteenth Year of the State.

PRESENT:

HON. GEORGE G. WRIGHT, CHIEF JUSTICE.

" WM. G. WOODWARD, } JUSTICES.
" L. D. STOCKTON, }

THE STATE OF IOWA v. KOEHLER.

After the taking effect of the new constitution of the State of Iowa, a grand jury had no legal authority to inquire into offences less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days.

Since the taking effect of the new constitution, the offence of selling intoxicating liquors is not subject to indictment.

The State of Iowa v. Kœhler.

Appeal from the Lee District Court.

MONDAY, OCTOBER 11.

At the March term, A. D. 1858, of the district court, and on the fifth day of that month, the defendant was indicted by the grand jury of Lee county, for unlawfully selling intoxicating liquors to a minor. The defendant demurred to the indictment, on the ground that the grand jury had no legal authority to inquire into the offence charged, which demurrer was overruled, and the defendant fined twenty-five dollars and costs, from which judgment he appeals. The errors assigned, go to the overruling of the demurrer, and the conviction of the defendant.

J. M. Beek, for the appellant.

Samuel A. Rice, Attorney General, for the State.

STOCKTON, J.—The demurrer to the indictment should have been sustained. The time laid, in both counts, for the commission of the offence, was subsequent to the taking effect of the present constitution of the State of Iowa, which provides that all offences less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days, shall be tried summarily before a justice of the peace, on information under oath, without indictment or the intervention of a grand jury. Constitution, Art. 1, section 11. The punishment affixed by the statute, for the offence with which the defendant is charged, is, on the first conviction, a fine of twenty dollars and costs of prosecution, and imprisonment for ten days, unless the fine and costs are paid. Act of January 22, 1855, section 6. The grand jury, therefore, had no legal authority to inquire into the offence charged.

Judgment reversed.

Goddard v. Cunningham.

GODDARD v. CUNNINGHAM.

Where the name of the plaintiff in a suit commenced by attachment, is signed to the attachment bond, by the attorney who commenced the suit, it will be presumed in the appellate court, in the absence of any showing to the contrary, that it appeared to the district court that the attorney had authority to sign the name of his client to the bond.

Where a plaintiff is in possession of the note on which suit is brought, and is the payee therein, he will be presumed rightly in possession of it; and the assignment on the back of the note will be taken to have been erased by proper authority.

Appeal from the Hardin District Court.

MONDAY, OCTOBER 11.

Action on a promissory note, payable to the plaintiffs, commenced by attachment. The attachment bond was signed by the plaintiff, by their attorney, who brought the suit. The defendant moved to quash the attachment, on the grounds that the attachment bond was insufficient, and the plaintiffs had never signed the same; which motion was overruled. The defendant being in default for want of an answer, and a jury called to assess the damages, the plaintiff offered the note in evidence, upon the back of which was indorsed "Pay to the order of Henn, Williams & Co. Goddard, Green & Co.;" and over which indorsement a black line of ink was drawn. The defendant objected to the note going in evidence, for the reason that there was no explanation of said indorsement, and that said indorsement showed that the note was not the property of the plaintiffs. The objection was overruled, and the note admitted in evidence. Verdict for the plaintiffs, and judgment thereon. The defendant appeals, and assigns for error the overruling the motion to quash the attachment, and the admission of the note in evidence.

Eastman & Greer, for the appellant.

 Webster v. Stewart.

Williamson & Nourse, for the appellee.

STOCKTON, J.—The motion to dissolve the attachment was properly overruled. In the absence of any showing to the contrary, it will be presumed that it appeared to the district court that the attorney had authority to sign the name of his client to the attachment bond.

After judgment by default, the defendant may appear at the time of the assessment of damages, and cross-examine the plaintiff's witness, but for no other purpose. Code, section 1831. The plaintiff being in possession of the note sued on, and being the payee therein, will be presumed to be rightfully in possession of it, and the assignment on the back will be taken to have been erased by due authority. *Gordon v. Pitt*, 3 Iowa, 390; *Cook & Owsley v. Walters*, 4 Ib., 72.

Judgment affirmed.

 WEBSTER v. STEWART.

Where a party seeks to recover for the value of improvements made by him upon the land of another, he must bring himself within the statute, and pursue the statutory remedy.

Where the rightful owner of real estate, obtains possession of his property without resorting to an action at law, he is not liable in an action at law for the value of improvements made by another.

A party not in possession of real estate, cannot sustain an action, under chapter 80 of the Code, in relation to occupying claimants, against the holder of the legal title, to recover the value of improvements made by him upon such real estate.

Where a petition alleged that the plaintiff, on the 6th of May, 1853, and prior thereto, was in possession of a certain tract of land, being part of the Half-Breed Tract, in Lee county, upon which, as occupying claimant, under color of title and in good faith, he had made valuable improvements, specifying them; "that under and by virtue of the occupying claimant law of the State of Iowa, he was entitled to the con-

Webster v. Stewart.

tinued possession and enjoyment of said premises, as against the owner in fee, until he was paid the value of said improvements;" that the defendant, not regarding the rights of plaintiff, on or about the said 6th of May, purchased the fee simple title to said land, "and unlawfully, wrongfully, and without the knowledge or consent of plaintiff entered upon said land, and took possession of the same and the improvements, and still retains the possession; and has hitherto refused, and still doth refuse to pay the plaintiff what the said improvements are reasonably worth; that the improvements are of the value of one thousand dollars; and that the value of the land without the improvements, is twelve hundred dollars; and where the petition then prayed for judgment for the value of said improvements, or if the defendant shall fail to pay the same, that the plaintiff be permitted to pay the value of the land; and where the petition was demurred to, and the demurrer sustained by the court; *Held*, That the demurrer was properly sustained.

Appeal from the Lee District Court.

WEDNESDAY, OCTOBER 13.

The petition in this case avers, that on the 6th of May, 1853, and prior thereto, plaintiff was in possession of a certain tract of land, being part of the Half-breed Tract in Lee county, upon which, as occupying claimant, under color of title and in good faith, he had made valuable improvements, (specifying them); "that under and by virtue of the occupying claimant law of the State of Iowa, he was entitled to the continued possession and enjoyment of said premises, as against the owner in fee, until he was paid the value of said improvements; that said defendant, not regarding the rights of said plaintiff, on or about the said 6th of May, purchased the fee simple title to said land, "and unlawfully, wrongfully, and without the knowledge or consent of plaintiff, entered upon said land, and took possession of the same and the improvements, and still retains the possession, and has hitherto refused, and still doth refuse, to pay plaintiff what the said improvements are reasonably worth." It is also averred, that the said improvements are worth one thousand dollars, and that the land, without the improvements, is worth

Webster v. Stewart.

twelve hundred dollars. Judgment is asked for the value of said improvements; or if the defendant shall fail to pay the same, the plaintiff proposes and asks, that he shall be permitted to pay the value of the land. To this petition there was a demurrer, which was sustained, and plaintiff appeals.

D. F. Miller, and Joseph M. Beck, for the appellant.

S. F. Miller, for the appellee.

WRIGHT, C. J.—The plaintiff seeks to recover for the value of improvements made by him upon the land of another—such improvements being made in good faith, and under color of title. At common law, he could not, in a separate action, recover, whatever the good faith with which his improvements were made, nor whatever his color of title, against one who held the superior or paramount title. On the equity side of the court, in some special cases, there might be a recovery, but not at law. *Greene v. Biddle*, 8 Wheat., 1; *Frear v. Hardenbergh*, 5 Johns., 272.

If, therefore, the plaintiff is entitled to recover, it must be by virtue of some statutory provisions. To do so, we think he must bring himself within the statute, and pursue the statutory remedy. The statute bearing upon this question, will be found in chapter 80 of the Code. This statute provides for a state of case where the occupant has color of title, and in good faith has made valuable improvements, and is afterwards, in the proper action, found not to be the rightful owner of the land so improved. In such a case, no execution can issue to put the rightful owner in possession, after the filing of the petition provided for, until the provisions of said chapter are complied with. The petition of defendant, therein referred to, must set forth the grounds on which the relief is sought, stating the value of the improvements, as well as the value of the land, aside from the improvements. The value of the

Webster v. Stewart.

improvements being ascertained, the rightful owner may, by paying the same, take the property. If he does not do so, however, within a reasonable time to be fixed by the court, the occupying claimant may take the same, by paying the appraised value of the land. If neither party shall thus pay, they are to be held as tenants in common, each holding an interest in proportion to the value of his property, as ascertained by the said appraisement.

Suppose, however, that the rightful owner obtains possession of his property, without resorting to his action at law, is he compelled to pay for the improvements, and if so, upon what ground? It will be observed that where the petition is filed, under chapter 80 of the Code, the defendant, or person who made the improvements, cannot collect the appraised value thereof by execution, as in ordinary actions. It is at the option of the plaintiff to pay the same, or he may permit the defendant to pay the value of the land, or they may become tenants in common of the property; but in no event is an execution to issue, to enforce the judgment against either party. The execution or process to put the plaintiff in possession of his land, is only suspended until he complies with the order to pay for the improvements. If he already has the possession, then it would seem that an order, or judgment, that he should pay for the improvements would amount to nothing, for there is no method in which it could be enforced. He is not liable at common law, and we think is only liable where the petition is filed by a defendant who, in a proper action, is determined not to be the rightful owner.

It is claimed that this view is unjust, and holds out a permission to the owner of land, to obtain possession by wrongful, fraudulent, or violent means. To this it may be answered, that in such cases the defendant, or person in the prior possession, is by no means remediless. If the plaintiff, or owner of the land, by force, intimidation, fraud or stealth, has entered upon the prior actual possession of the defendant, and detains the same, such prior

Rogers v. Vass.

occupant is given his summary remedy for such entry and detention; and in that action, the question of title cannot be investigated. Code, sections 2362, 2371. Having in this method, maintained his right to the possession, the owner of the title would be driven to assert it by proper action, and then the occupying claimant could file his petition under the Code, for pay for improvements. So, there might be such circumstances of fraud, on the part of the owner of the land, as to entitle the occupant to recover in equity for his improvements. But where the owner of the title has acquired the possession, and continues to hold it, we do not think he is liable at law for the value of the improvements. We have seen, he is not liable at common law. The statute makes him liable in a particular manner, and this remedy must be pursued. If this statute is defective—does not cover all the cases it should—the remedy is in the hands of the legislature, and not in the courts. While for every injury, and for the enforcement of every right, there is a remedy, yet it must always be remembered that, (on the law side of the court, at least), this rule has reference to legal rights, and legal remedies.

Judgment affirmed.

ROGERS v. VASS.

6	405
102	97

The provision in the act entitled "An act in relation to the Swamp Lands of this State," approved January 24, 1857, which provides that the act shall not apply to the actual settlers on said lands at the time of the passage of the act, has legal reference to the time of the taking effect of the act, and not to the time of its passage.

The district court possesses jurisdiction to set aside a certificate of pre-emption, granted by the county judge, under the act entitled "An act to prevent trespass or waste on swamp or other lands in the State of Iowa, and for other purposes," approved January 25, 1855, where the same has been obtained by fraud and misrepresentation.

In a proceeding to set aside a certificate of pre-emption of swamp lands,

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granted by a county judge, on the ground that the same was obtained by fraud and misrepresentation, it is not necessary to make the county judge a party.

Where a party who has obtained a certificate of pre-emption of swamp lands, has not complied with the statute, and had no right of pre-emption, it is competent for any one to enter upon the land, make his improvements and claim the pre-emption, although such entry and improvements were made after the granting of the certificate.

Where a party claiming a right of pre-emption to certain lands, brought his bill in equity to set aside a certificate of pre-emption of the land, granted by a county judge, alleging that, on the first of June, 1857, and immediately subsequent thereto, he *bona fide*, commenced and built a dwelling on the said land, with the intent to reside thereon, and cultivate the same; that within sixty days thereafter, he filed his claim before the county judge of Fremont county, and offered proof of his improvement, but the county judge refused to grant him a certificate of pre-emption, or to allow his claim, upon the alleged ground that the respondent had, before that time received a certificate of pre-emption to three-quarters of the same quarter; that the said respondent had not made any improvements or settlement upon the said land; and that his certificate was obtained by fraud and misrepresentation, and was void; to which bill there was a demurrer, which was sustained by the court; *Held*, That the court erred in sustaining the demurrer.

Appeal from the Fremont District Court.

WEDNESDAY, OCTOBER 13.

The complainant claims a right of pre-emption to the south-east quarter of section thirty-four, in township sixty-nine, north range forty-three west, under the act of Congress of the 20th of September, 1850, and the acts of the general assembly of Iowa, of January 15, 1853, (Acts of 1853, 29), and of 25th of January, 1855, (Acts 1855, 228). He sets forth, that on the first of June, 1857, and immediately subsequent thereto, he *bona fide*, commenced and built a dwelling on the said land, with the intent to reside thereon, and cultivate the same, and within sixty days thereafter, filed his claim before the county judge of Fremont county, and offered his proofs of such his improvement, but the county judge refused to grant him a certificate of pre-emption, or to allow his claim, upon the alleg-

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ed ground that the respondent had, before that time, received a certificate of his right to the pre-emption of three quarters of the same quarter. The petitioner's bill is brought to set aside the certificate of the defendant, upon the alleged ground that it is void; and he alleges that the defendant had not made any improvement or settlement upon the said land, and that his certificate was obtained by fraud and misrepresentation, and that the same is void. The respondent demurred to the bill, assigning ten causes, (which are sufficiently noticed in the opinion of the court), which demurrer was sustained, and the plaintiff amended. The petitioner obtained a conditional default under the rules, and at the March term, 1858, moved a confirmation of the default, which the court overruled, and dismissed the bill. The complainant appeals.

Rector & Harvey, for the appellant, cited Story's Equity Pl., sec. 72, 77, 232; 4 Bouv. Inst., 320; *Sands v. Codwise*, 4 Johns., 464, note *a*; 2 Hill. Real Prop., 483, and notes; *Ib.*, 450; *Arnold v. Grimes*, 2 Iowa, 18; 2 Bacon's Abridge., 775; 1 Bouv. Inst., 226; 2 *Ib.*, 487; 3 *Ib.*, 669; 2 Par. on Cont., 66; Story on Cont., sec. 393; Chitty on Cont., 206; 2 Kent, 234, 453; 5 Gillman, 574; *Scott v. Purcell et al.*, 5 Blackf., 67; *Anderson v. Roberts*, 18 Johns., 575; *Manhattan Co. v. Evertson*, 6 Paige, 467; *Doe v. Manning*, 9 East, 58; *Bridge v. Eggleston*, 14 Mass., 245; 12 *Ib.*, 456; *Goodwin v. Hubbard*, 15 *Ib.*, 210; *Richard v. Ham*, 14 *Ib.*, 137; *Gilbert v. Hoffman*, 2 Watts, 66; *Edgell v. Lowell*, 4 Vermt., 405; *Walmesley v. Demattos*, 1 Burr, 474; *How v. Ward*, 4 Greenl., 195; 1 Johns. Ch., 512.

Bates & Phillips, for the appellee, relied upon *Kerr v. Stewart*, Morris, 433; *Green v. Stuben Co. Bank*, 1 G. Greene, 447; *Harmon v. Chandler*, 3 Iowa, 150; *Stutsman v. School District No. Two*, 1 Iowa, 94; *Floyd v. Mosier*, *Ib.*, 512; *Ayres v. Campbell*, 3 Iowa, 582; *Mitchell*

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v. *Wisotta Land Co.*, 3 Ib., 209; *Brewington v. Patton & Swan*, 1 Ib., 121; *Lampson v. Platt*, 1 Ib., 556.

WOODWARD, J.—The point made by the defendant upon the default, cannot be considered, for the reason that it depends upon the rules of the court, and these are not made a part of the case, nor is it in any way before us.

But the principal questions arise upon the sustaining the demurrer to the bill. It is not necessary to set out the numerous causes of demurrer. They are all embraced in two or three, which aver that the petitioner does not show that he had any claim of right at the time when Vass proved up his claim; that he does not show that he was defrauded by Vass obtaining his certificate, inasmuch as defendant had no equitable right as a pre-emptor at that time; and that if the county was defrauded as alleged, third parties, who do not show that they were injured at the time, have no right to complain. It is true that, as defendant urges, the error in sustaining the demurrer, is waived by the amendment; but as the court dismissed the bill for want of equity, the same questions again arise, as well as others presented by the respondent.

A prominent objection made by the defendant is, that the right of pre-emption was taken away by the act of 24th of January, 1857, (Acts 1857, 127), which repealed all prior acts allowing a pre-emption on the swamp lands; but with a proviso saving all actual settlers on said lands at the time of the passage of said act. As the act was passed in January, and the petitioner began his improvement in June, the defendant insists that the former acquired no right of pre-emption, he not being a settler at the passage of the act. But the objection is not well founded. This, and similar expressions, in statutes, has legal reference to the time of their taking effect. No other construction would be consistent with that requirement of the constitution, which provides that the laws shall be published before they take effect. The defendant's construction would give it the same effect, as if it

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provided for going into force at its passage. The plaintiff having made his improvement and acquired his right, during the existence of the law, its repeal will not take it away, though he may not have obtained his certificate before the repeal.

Again: the respondent contends that this court has no jurisdiction in the case, and that the district court could not have it, through this bill. He argues that the original cognizance of claims on the swamp lands, is in the county court, and that an appeal lies to the district court, whose decision is final. He then contends that the plaintiff should apply to the county court, as he did, and if that court will not hear his claim, on account of a certificate previously granted, he should apply for a mandamus, and on a hearing contest the previous claimant's right. These objections proceed upon an erroneous view of the character and object of the present proceeding. The complainant claims the right of pre-emption, and offers his proofs. The county judge refuses his application, because a prior claim has been allowed on the same land. According to the decision in *Arnold v. Grimes*, 2 Iowa, 18, the county judge could not set aside the certificate granted by him, but the question belongs to the courts of the state. The petitioner, therefore, goes into a court of chancery to cause that certificate to be declared of no force.

A settlement or improvement on the land, is an essential condition precedent to the right of pre-emption, and the foundation of the complainant's bill, is the allegation, clearly and repeatedly made, that Vass had made no improvement, and that his certificate was obtained through fraud and misrepresentation. If the petitioner can show these things, it is his right to do so, and the effect would be to invalidate the certificate granted to Vass. The case is of the same character as some in the books, in which certificates granted by the land officers of the United States, have been set aside. It is not asked, nor expected, that this court, nor the district court, under this

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bill, should grant the plaintiff's claim to pre-emption; but that, the certificate of the defendant being set aside, the plaintiff can go before the county judge, and prove his claim, without having this obstruction in his way.

The objection that the county judge is not made a party defendant, is without weight. There is no occasion for his being brought in as a party. Nor is it of any weight that the claim of Vass did not conflict with any prior claim of Rogers. If the former had not complied with the statute, and had no right of pre-emption, it was competent for any one to enter upon the land, make his improvement, and claim his pre-emption, although it were after the allowance of the certificate to Vass. There being no improvement on the land, it was subject to the entry of any one. Much of the defendant's argument goes upon the erroneous idea, that the case is brought to this court upon error of law, instead of being an appeal in chancery, which opens the whole case.

The defendant should be held to answer the bill, and the decree is therefore reversed, and the cause remanded, with directions to proceed in accordance with this opinion.

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Generally speaking, the validity of a contract is to be determined by the law of the place where made. If valid there, it is by the general law of nations, held valid everywhere, by the tacit or implied consent of the parties.

But this rule is subject to important exceptions, viz: 1. That neither the State nor its citizens may suffer any injury or inconvenience, by giving legal effect to the contract; 2. That the consideration of the contract be not immoral, and the giving effect to it will not have a bad tendency, or exhibit to the citizens of the State, an example pernicious and detestable; 3. That the contract be not opposed to the policy and institutions of the State where it is sought to be enforced.

To give effect to contracts made out of the State, is an act of comity due from the courts of the State in which they are sought to be enforced, to

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the State in which they were made. The *lex loci* is to be adopted in deciding on the nature, validity, and construction of the contract. So far the obligation of the law of comity extends, but no farther.

A State may say how far the laws of another State are to be enforced by her courts; and this, without impairing the obligation of contracts.

Contracts which are in evasion or fraud of the laws of a country, or of the rights or duties of its subjects—against good morals, or against good religion—or against public right; and contracts opposed to the national policy, or national institutions, are deemed nullities in every country affected by such contracts, although they may be valid by the laws of the place where made.

No State is bound to lend the assistance of its courts to enable a party to evade or contravene its laws, or to enforce a contract subversive of its policy or institutions, although the contract may have been valid in the place where made, and might have been enforced in the courts of that State.

A contract made in another State, with intent to enable the defendant to sell intoxicating liquors within this State, in violation of the act for the suppression of intemperance, approved January 22, 1855, is opposed to the policy of the State, and cannot be enforced in our courts.

Section five of the act for the suppression of intemperance, which provides that "no action of any kind shall be maintained in any court of this State, for intoxicating liquors, or the value thereof, sold in any other State or country, contrary to the laws of said State or country, or with intent to enable any person to violate any provision of this act," is not unconstitutional and void, as operating to impair the obligation of contracts.

Laws made prior to the formation of a contract, cannot impair its obligation, because all existing laws enter into the contract when made, and define and determine it.

Where in an action to recover the value of certain intoxicating liquors, the defendant answered, alleging that the said liquors were sold to defendant by plaintiff, in the State of Illinois, in the year 1857, with intent to enable the defendant to violate the statute and laws of the State of Iowa; that the same were shipped from Chicago directed to defendant at Iowa City, in Johnson county, with the knowledge that the defendant was not the agent of said county, for the sale of intoxicating liquors; that the same were intended to be sold in said county, without authority, and contrary to the statute of Iowa, in such cases made and provided; and that at the time of the sale and shipment aforesaid, the said defendant was not the agent of said county, authorized to sell intoxicating liquors in said State; to which answer a demurrer was filed, and overruled by the court; *Held*, That the demurrer was properly overruled.

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Appeal from the Johnson District Court.

WEDNESDAY, OCTOBER 13.

This is an action to recover the value of certain brandy, wine, ale, porter, schnapps, &c., alleged to have been sold and delivered to defendant, by the plaintiff. The defendant answered that the same were intoxicating liquors, sold to defendant by the plaintiff, in the State of Illinois, in the year 1857, with intent to enable the defendant to violate the statute and laws of the State of Iowa; that the same were shipped from Chicago, directed to defendant at Iowa City, in Johnson county, with the knowledge that the defendant was not the agent of said county for the sale of intoxicating liquors; and that the same were intended to be sold in said county, without authority, and contrary to the statutes of Iowa in such case made and provided. And defendant avers that at the time of the sale and shipment aforesaid, he was not the agent of said county, authorized to sell intoxicating liquors in said State.

To this answer there was a demurrer, which was overruled by the court. The plaintiff stood upon his demurrer, and judgment was rendered for the defendant. The plaintiff appeals, and assigns for error the overruling the demurrer.

Theodore M. Davis, for the appellant.

I. As appears from the defendant's own showing, the contract for liquors was made in the State of Illinois, where no such law as is set up in defence exists; therefore, it could not have been in violation of the laws of that State, and was a good and valid contract in that State. A contract good and valid where made, is good every where, and can be enforced any where. *Trundy v. Vegnier*, 1 Big., N. C., 151; *Wellings v. Censeque*, 1 Pet., C. C., 317; *Pearsall v. Dwight*, 2 Mass., 88; *Smith v. Mead*, 3 Conn.,

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253 ; *Neelley v. Hopkins*, 3 Conn., 473. Again : That a contract relating to moveables, is to be construed according to the law of the place where it is made, or the *lex loci contractu*. *Thorne v. Watkins*, 2 Ves., 54 ; *Holmes v. Runsen*, 4 Johns. Ch., 487 ; *Harvey v. Richards*, 1 Mason, 412 ; *Bruce v. Bruce*, 2 B. & P., 229 ; and further on this point : The contract must be governed by the laws of the country where the contract was made. *Mede v. Roberts*, 3 Esp., N. C., 163. And we think that this is the universal rule : that if a contract was entered into in a State where it was good and valid, that it is, therefore, good here, and can be enforced here. Therefore, we think that as defendants acknowledge that the contract was good where made, that they cannot set up in defence said "act for the suppression of intemperance."

II. Our second ground of demurrer is founded on this point : That the contract being valid and legal when and where made, cannot be vitiated or affected by the laws of Iowa ; and to sustain the position that we assume, we cite 11 How., 464, in which case the following decision was rendered : "That if a contract is entered into in another State, in conformity to the local law, to have its effect and execution there, the courts of Louisiana cannot declare it a nullity, on the ground that it would not be valid according to the laws of said State, even if one or both of the contracting parties were not citizens of said foreign State ; and we find in *Orcutt v. Nelson*, 1 Gray, 541, the following decision : "The court are therefore of opinion that a sale of liquors in Connecticut, without any fraudulent view to their re-sale in Massachusetts, was not unlawful, and that an action may be maintained in this commonwealth for the price of the liquors sold. We go farther than this, and say, that if a guilty knowledge is admitted by us, or rather, that if the goods were sold with a knowledge of their re-sale, that even then, we can recover in this State, provided we have no interest in the re-sale, and are to derive no benefit from the violation of the law." *McIntyre v. Park*, 3 Metc., 207. We quote from the de-

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cision in the cases of *Holman v. Johnson*, Cowp., 341, and *Hanny v. Eve*, 3 Cranch, 242, in which the following points were decided, viz: That in a case where goods were sold to an Englishman in France, by a Frenchman, for the known purpose of being smuggled into England, still that the Frenchman could maintain his suit in England for the price of the goods, upon the ground that the sale was complete in France, and that the party had no connection with the smuggling transaction. The contract was complete, and nothing left to be done. We think that this is a parallel case with ours, for, as appears from their own showing, the contract was complete when the goods were delivered at the depot in Chicago; that the sale and delivery was made at Chicago, in Illinois, and from all that appears the plaintiff was not to receive any benefit from the re-sale; and it is reasonable and just to suppose that such was the case. It was held in Massachusetts, where lottery tickets were sold to a citizen of Massachusetts, in the State of New York, such sale being prohibited by the laws of Massachusetts, that the value of said tickets could be recovered in the State of Massachusetts, because such sale was good where made, and that the contract was completed in the State of New York. *McIntyre v. Parks*, 2 Metc., 207—substantially carrying out, and supporting the doctrine of *Holman v. Johnson*, Cowp., 341, and *Hanny v. Eve*, 3 Cranch, 242. Now we ask, if these cases have any weight or influence with the courts of this State, can they be influenced or guided by these decisions, and also by our laws? We say that the law under which these decisions were rendered, were similar in relation to the validity of contracts; and that still, the courts held, that even under the law, actions could be maintained; therefore, our position, that the act set up is no defence to the plaintiff's cause of action, is sustained.

III. This brings us to the third ground of demurrer, and the only one that remains to be argued, and it is this: Any contract being valid where made, cannot be affected or defeated by the laws of Iowa, as such laws impair the

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obligation of contracts, and are null and unconstitutional. We admit that the legislature has power to pass laws changing the remedy, and rendering it less speedy and convenient in enforcing contracts, but we say, that when they leave no substantial remedy—take away all means of enforcing the same—that then they come in direct conflict with the constitution. *James v. Stall*, 9 Barb., 482. With that portion of it, particularly, which is embodied in the twenty-first section of the Bill of Rights, which declares that “no law impairing the obligation of contracts shall ever be passed.” Now let us see what is the obligation of a contract, and secondly, what impairs it. “A contract is an agreement in which a party undertakes to do, or not to do, a particular thing.” This, then, is a contract, or the legal definition of a contract. “The law binds him to perform his undertaking; and this is the obligation of his contract. Any law which releases a part of this obligation, must, in the literal sense of the word, impair it. Much more so must a law impair it, which makes it totally invalid and entirely discharges it. Chief Justice Marshall, in *Sturges v. Crowninshield*, 4 Wheaton, 197. Now we suppose that the only question, or, rather, fact, that it is necessary for us to establish is, that this “act for the suppression of intemperance” impairs the obligation of contracts; for if it does, then certainly this law is unconstitutional and void. We have seen what a contract is, in legal contemplation; also that which constitutes the obligation of a contract. Therefore, let us look at this act, and ascertain what it seeks to do. It says: “All sales, transfers, mortgages, liens, attachments, pledges, and securities of every kind, whether given in whole or in part for liquor, shall be void,” and further, “that no action of any kind shall be maintained in any court of this State for the value of intoxicating liquors.” Laws of 1854, section 15, 68. Now, does this law release a debtor, in part, from the obligation of his contract? We contend that it not only releases him in part, from his obligation, but that it goes much farther, and strikes at the very bottom

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of his contract, saying as plain as a law can say, that the obligation of your contract is entirely destroyed—you are entirely free; for certainly a contract that has any obligation can be enforced in any court, and in any State; and, in fact, the only way in which the legislature could possibly reach this point, without violating every principle and rule of law, was, by destroying the obligation of a contract, and then saying your contract has no obligation, and therefore, of course, cannot be enforced. Another definition of the law, we find in Institutes, Lib. 3, Tit. 14. "An obligation is the chain of the law, by which we are necessarily bound to make some payment according to the law of the land." Is it not apparent, that if this be true, that the "chain of the law that binds us to make payments" on our contracts, constitutes the obligation of our contract—that this act, when sought to be applied to contracts entered into out of the State, not only takes from that chain one link, but destroys the whole chain? And if this be so, is not this act in direct conflict with the constitution of this State?

As we stated in the first part of this argument, "a contract good where made, is good everywhere." It cannot be denied but that this contract was good where made, and that it was entered into in good faith. Can, then, we ask, such a law be constitutional, which says that all contracts shall be null and void, and that no action of any kind, can be maintained on such a contract. If this act is constitutional, and can be set up in defence, what will it lead to? A citizen of this State could enter into as many obligations as he pleased with a citizen of a foreign State, such a contract being good and valid where made; and as a citizen is not bound to know the laws of a foreign State, (1 Burge on Col. and For. Law, Pa., 1 Ch., 4) therefore, even if he knew that the goods were to be shipped to this State, he would still consider that he was entering into a contract that could be enforced the world over; but as soon as the merchandise reached this State, the purchaser could "take advantage of his own wrong," and defraud

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an innocent party out of his just dues. It can be readily seen what this would lead to. It would open a door to the citizens of this State to commit the greatest frauds with impunity. Not only would they be defended and sustained in so doing, by a law that impairs and entirely destroys the obligation of contracts, but by a law that impliedly says, that a contract, good where it is made, even if it be of the most solemn character, would be of no validity here, nor could it be enforced, and in so doing violate one the plainest and best settled principles of law. Not only would the wheels of commerce be blocked, but if this law is constitutional, and can be enforced, when applied to contracts effected outside of this State, the credit of this State would be ruined. There are plenty of men residing in this State who would take advantage of this act, and in so doing would not only rob innocent men of foreign States, but would deprive us all of our characters for honesty, and would cast upon our laws a slur and stigma that it would take years to remove.

Our last ground of demurrer, and the last point that we shall argue, is as follows: The facts alleged in said answer constitute no defense to plaintiff's cause of action. We find in Story on Conflict of Law, 252, the following: "In certain places particular merchandise is prohibited. If sold there, the contract is void. But if the same merchandise is sold in an other place, where there is no such prohibition, and a suit is brought upon the contract, in the place where the prohibition exists, the buyer will be held liable, because the contract was, in its origin, valid." On this ground we hold that the matter set up in defense constitutes no defense to plaintiff's cause of action. We hope that this question will be fully and fairly considered by your Honors.

Edwards & Ransom, for the appellee.

The whole question for the consideration of this court is: Does the statute referred to conflict with the constitu-

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tional provision with respect to impairing the obligation of contracts? or does this contract come under the rule that a contract good where made, is valid everywhere.

As a general rule the laws of one State have no force or efficiency beyond the boundaries of that State. Whatever effect is given to the laws of Illinois by our courts, is from courtesy and comity, and not as a matter of right. And our courts will decide as to how far this comity should extend, and will see that the dignity of our laws and the rights of our people shall be maintained and preserved. Story's Con. Laws, 370, section 244.

That the legislature of this State had the right to pass the act in question, and render contracts made within this State in violation thereof, and after its passage, void, cannot be questioned. It is essentially a police regulation; and if a foreign article be injurious to the health and morals of a community, "a State may, in the exercise of that great and conservative police power which lies at the foundation of its prosperity, prohibit the sale of it." Taney, J., in the License Cases, 5 Howard, 504 *et seq.* And the same justice in those cases says: "The acknowledged police power of a State often extends to the destruction of property—a nuisance may be abated—everything prejudicial to the health or morals of a city may be removed; merchandise from a port where a contagious disease prevails, being liable to communicate the disease, may be excluded, or even thrown into the sea. This comes in direct conflict with the regulations of commerce, and yet no one doubts the local power. It is a power essential to self-preservation. It is the law of nature, and is possessed by man in his individual capacity. He may resist that which does him harm, whether he be assailed by an assassin, or approached by poison." And the same doctrine has been affirmed by this court in *Santo et al. v. The State of Iowa*, 2 Iow., a 165, and cases there cited.

Does a citizen of another State, then, when he acts in fraud, evasion, or violation of our laws, and with the express intention of enabling a citizen of this state to violate

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those laws, possess any greater rights, or more enlarged privileges, than one of our own citizens, guilty of the same wrongs? or do contracts made without the boundaries of our State, and without the jurisdiction of our courts, when they are made in fraud or evasion of our laws, as in the case at bar, with the knowledge of, and intent to violate such laws, or to enable one of the parties to such contract to do so, possess any more binding force or efficacy than contracts made in our own State under, the same circumstances? And will our courts allow foreign persons to claim their protection, and enforce remedies with their assistance, with regard to contracts made and acts done, knowingly and wilfully in violation of our laws, and in a manner insulting to our dignity?

If an affirmative answer to these questions is given, it must be upon the principle, that the comity of nations is extended without limit or exception, to all parties making contracts in a foreign State, and that all contracts made in such foreign State, no matter how odious to us, or however much they may interfere with our police regulations, if valid where made, may be enforced in our courts.

The principle does not by any means extend so far, but is modified by numerous exceptions.

No nation or State is bound to recognize any contracts, or enforce them, which are injurious to its own interests, or to those of its own subjects, (Story Conf. Laws, section 244), and in the language of Marshall, J., in 8 Martin, 95, 97, the same exception "applies to cases in which the contract is immoral, or unjust, or in which the enforcing it in a State, would be injurious to the rights, the interests, or the convenience of such State or its citizens." And there are further exceptions, such as contracts made in evasion or fraud of a country, or rather of its laws, of the rights or duties of its subjects, contracts against good morals, or against religion, or against public rights, &c. Story Conf. Laws, sections 244, 245, 6, 7.

The reason why this international comity has been established is, that innocent parties may be protected;

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that persons in making contracts are in ordinary cases, supposed to know, and have reference in their acts and contracts only to the local law where such acts are done, or such contracts are made. The courts delight in the protection of the innocent, and in aiding them in procuring their rights; but the reason of the rule, and its good sense cease, when it is attempted to be applied to cases like the one at bar, where the party seeking to enforce the remedy was not innocent, and where he shows that he did not have reference solely to the laws of Illinois, but intended to be accessory to a palpable violation of the law of this State.

We contend, therefore, that this contract cannot be interpreted under the general rule referred to, i. e. "That a contract good where made, is valid everywhere;" but that it clearly comes under several of the exceptions to that rule above mentioned.

The only cases referred to by the appellant's counsel, which would seem for a moment to sustain the grounds taken by him, are the cases from Cowper, 346, and *McIntyre v. Park*, 3 Metc., 207. In these cases, the seller of goods sold to a resident of a foreign State, with the knowledge that the goods were to be re-sold in a foreign State, (where the seller sought his remedy), contrary to law. The case at bar is different, and more strictly comes under the exceptions referred to. Here the plaintiff below sold the liquors, not merely with the knowledge that they were to be re-sold in the State contrary to law, but also with the intent to enable the defendant below to violate the provisions of our statutes. He had not only the knowledge that a wrongful act was to be done, but made himself a party, or a kind of accessory to the defendant, in the perpetration of that wrong. The intention to assist the defendant below in violating our law, entered into and formed a part of the contract. The simple knowledge might not be sufficient, perhaps, to show that the plaintiff acted and made the contract in fraud or evasion of Iowa laws, but a deliberate intention

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to “enable the defendant to violate, &c.,” most clearly do establish that fact.

The authority of the two cases above mentioned (3 Metc. 207, and in Cowper) is, however, denied by Story J., in his Conf. Laws, section 253. He quotes an opinion of C. J. Eyre, as follows: “Upon the principles of the common law, the consideration of every valid contract must be meritorious. The man who sold arsenic to one who he knew intended to poison his wife with it, would not be allowed to maintain an action upon his contract. The consideration of the contract is tainted with turpitude which destroys the whole merit of it. No man ought to furnish another with the means of transgressing the law, knowing that he intended to make that use of them.” This reasoning, says Story, “seems positively unanswerable.” *Ib.*

The same doctrine has been affirmed in other cases. So, in *Langton v. Hughes*, Lord Ellenborough said, (the court of King’s Bench all concurring), “If a person sell goods with a knowledge, and in furtherance of the buyer’s intention to convey them upon a smuggling adventure, he is not permitted by the policy of the law to recover such a sale.” And in the same case, Bayley, J., said, “If a principal sell articles in order to enable the vendee to use them for illegal purposes, he cannot recover the price”—an extract parallel to the case at bar. See, also, Story Conf. Laws, section 254, and cases there cited.

The case of *Orcutt v. Nelson*, 1 Gray, 541, referred to by appellant’s counsel, impliedly sustains the same principle in which the court say, “that a sale of liquors in Connecticut, without any fraudulent view to their resale in Mass., contrary to law, was not unlawful,” &c. So, also, the case of *Hannay v. Eve*, 3 Cranch, 242, referred to by appellant’s counsel, is directly in favor of our position. And see sections 254, 255 Story Conf. Laws, cases cited, and note with remark of commentator.

From the authorities, therefore, and from a consideration of the reasons which lie at the basis of international

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comity, we believe that a suitor who has placed himself in the position of the appellant—who has known that when he made the contract sought to be enforced, it was in violation of our laws, and made with the intent to enable another to violate those laws, and in fraud and evasion of them—will not, nor ought to be, placed on any better footing in our courts, than any one of our own citizens guilty of the same offence, and that our courts will not permit, under sanction of their courtesy, or of international politeness, a border warfare to be waged upon our institutions by evil disposed persons of other States; nor will they extend their protection to persons who place themselves in this hostile position.

The law of Iowa, above referred to, can in no sense be said to impair the obligations of this contract, for in order to impair an obligation, the obligation must have existed when the law took effect. The law of Iowa is not intended to be retrospective in its character, and it is not contended in this case that it is of such a character. Mr. Parsons, in his work on contracts, says: “The latter, (viz: laws enacted subsequent to the formation of the contract), may certainly impair the obligation of contracts, while the former, (viz: laws enacted prior to the formation of the contract), certainly cannot, because all existing laws enter into contracts made under them, and define and determine that contract.” 2 Par. on Contrs., 537. How can the obligation of this contract in the case at bar, be impaired by the act of Iowa in question, when the contract was made long after the passage of the act, and, as the terms of the contract show, with direct reference to the act?

It seems to us that the law of Iowa goes to the remedy of the party so far as all contracts made under these circumstances, since its passage, are concerned, and can in no manner be said to affect the contract itself. Our legislature has told the world, that the sale of intoxicating liquors, for certain purposes, is injurious to the morals, order and happiness of our people, and impedes their

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prosperity; that the traffic in those articles must be, and is, prohibited; that parties making contracts for the sale of intoxicating liquors in this State, after the passage of the act, cannot enforce them in our courts, and that contracts made in other States in good faith, and without any fraudulent design, or intent to violate our statutes, may also be enforced in our courts: but that parties in other States, who, knowing our laws, make contracts in violation of them, and act with an intent to violate those laws, and to enable other persons so to do, can have no remedy in our courts on such contracts. We contend that our legislature had a right, and it was their duty, with regard particularly to a police regulation of so much importance, so to speak and enact. The contract is still enforceable in Illinois; it is not therefore affected by the law in question. The remedy of the party is simply taken away.

STOCKTON, J.—The defence is based upon the fifteenth section of the “act for the suppression of intemperance,” which provides that “no action of any kind shall be maintained in any court of the State for intoxicating liquors, or the value thereof, sold in any other State or country, contrary to the laws of said State or country, or with intent to enable any person to violate any provision of this act; nor shall any action be maintained for the recovery or possession of any intoxicating liquors, or the value thereof, except in cases where persons owning or possessing such liquors with lawful intent, may have been unlawfully deprived of the same. Act of January 22, 1855, section 15. The authority of this statute, must be paramount with us, and is decisive of this cause, unless, as is contended by plaintiff, it is not intended to apply to the case made by him, or is unconstitutional and void, as impairing the obligation of contracts.

It is claimed by plaintiff that the contract is to be construed according to the law of Illinois, where made; and if valid there, it is valid every where else, and cannot be rendered invalid by the law of Iowa.

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“There can be no doubt,” says Lord Mansfield, in *Holman v. Johnson*, Cowper, 341, “but that every action tried here, must be tried by the law of England; but the law of England says, that in a variety of circumstances, with regard to contracts legally made abroad, the laws of the country where the cause of action arose, shall govern.” *Male v. Roberts*, 3 Espinass N. P., 163. Generally speaking, the validity of a contract is to be decided by the law of the place where it is made—*lex loci contractu*. If valid there, it is, by the general law of nations, held valid everywhere, by the tacit or implied consent of the parties. Story’s Conflict of Laws, section 242. The plaintiff states the rule in language stronger—that if the contract is valid where made, it is valid everywhere, and cannot be rendered invalid by the law of any other State. To give effect to contracts made out of the State, is an act of comity due from the courts of the State in which they are sought to be enforced, to the State in which they are made. The *lex loci* is to be adopted in deciding on the nature, validity and construction of the contract. So far, the obligation of the law of comity extends, but no farther. *Pearsoll v. Dwight*, 2 Mass., 88. So, a contract made in a foreign place, to be there executed, if valid by the laws of that place, may be a legitimate ground of action in the courts of this State, although such contract may not be valid by our laws, or even may be prohibited to our citizens. Contracts for a greater rate of interest than is allowed by the State where they are attempted to be enforced, are instanced as an illustration of this rule. *Greenwood v. Curtis*, 6 Mass., 378. But where upon a contract made in New York, and to be there performed, the parties both being residents of that State, a suit was brought in Massachusetts, it was held that the statute of limitations of New York could not be pleaded in bar of the action. *Pearsoll v. Dwight*, 2 Mass., 88. The rule, however, is subject to important exceptions: 1. That neither the State, nor its citizens may suffer any injury or inconvenience by giving legal effect to the contract; which should not, in itself, nor in the means used to give

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it effect, work injury to the country where it is attempted to be enforced. Story on Conflict of Laws, sec. 244; *Greenwood v. Curtis, supra*; *Ohio Ins. Co. v. Edmondson*, 5 Louis., 295. 2. That the consideration of the contract be not immoral, and the giving effect to it will not have a bad tendency, or exhibit to the citizens of the State an example pernicious and detestible. No man ought to be heard in a court of justice, to enforce a contract founded in, or arising out of, moral or political turpitude, or in fraud of the just rights of any foreign nation. *Armstrong v. Toler*, 11 Wheaton, 258. 3. The contract must not be opposed to the policy and institutions of the State where it is sought to be enforced. In all such cases, the contracts will be held utterly void, whatever may be their validity in the country where they are made, as being inconsistent with the duties, the policy, or the institutions of the State where they are sought to be enforced. Story on Conflict of Laws, sec. 259.

It is not claimed by defendant that the law of Iowa operates extra-territorially, to repeal or supercede the laws of Illinois. The State may say how far, however, the laws of another State are to be enforced by her courts; and this, without impairing the obligation of any contract. The plaintiff, without recognizing the exceptions to the rule, claims for it an authority superior to that of our own legislature. The authority, (says Story), of acts and contracts done in other States, as well as the laws by which they are regulated, are not, *proprio vigore*, of any efficiency beyond the territories of that State; and whatever effect is attributed to them elsewhere, is from comity, and not of strict right. Every independent community will, and ought to, judge for itself, how far that comity ought to extend. The reasonable limitation is, that it shall not suffer prejudice by its comity. Conf. Laws, sec. 244. In cases turning upon the comity of nations, (says Mr. Justice Best), it is a maxim that the comity cannot prevail in cases where it violates the law of our own country, or the law of nature, or the law of God. Contracts, therefore, which are in

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evasion or fraud of the laws of a country, or of the rights or duties of its subject—against good morals or against religion—or against public right; and contracts opposed to the national policy or national institutions, are deemed nullities in every country affected by such considerations, although they may be valid by the laws of the place where they are made. *Forbes v. Cochran*, 2 B. & C., 448. The case of *Holman v. Johnson*, cited often in support of the doctrine contended for by the plaintiff, was for the price of a quantity of tea, sold and delivered to the order of defendant, at Dunkirk, by plaintiff, knowing it was to be smuggled into England. The plaintiff was to have no hand in the smuggling, but merely sold the tea to defendant, as to any other person in the ordinary course of trade. The defence was, that the contract for the sale of the tea was with an intention to make an illicit use of it, with the privity and knowledge of the plaintiff, and he was not, therefore, entitled to the assistance of the laws of England to recover the value of it. Lord Mansfield said: “No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, then the court says he has no right to be assisted.” “The question, therefore, is, whether in this case the plaintiff’s demand is founded upon the ground of any immoral act or contract, or upon the ground of his being guilty of anything prohibited by a positive law of this country. An immoral contract it certainly is not, for the revenue laws themselves, as well as the offences against them, are *positivi juris*.” And the court held, that as the plaintiff’s contract was only to sell and deliver the tea at Dunkirk, although he knew what the buyer was going to do with it, yet, as he had no concern in the transaction itself, and as his intent was totally at an end by the delivery at Dunkirk, he had transgressed no law of England, and was entitled to recover. *Holman v. Johnson*, Cowper, 341.

The case of *Pellicat v. Angell*, 2 Crompt., Mees, &

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Rosc., 311, was upon a bill of exchange accepted in France, by the defendant, a British subject, payable to the plaintiff, a Frenchman, being for the price of goods sold by the plaintiff to the defendant, in Paris, for the avowed purpose of being smuggled into England. The court held, that "where parties enter into a contract to contravene the laws of their own country, such contract is void; but that the subject of a foreign country is not bound to pay allegiance to the revenue laws of another; except that where he comes within the act of breaking them himself, he cannot, in such country, recover the fruits of his illegal act. But there is nothing illegal in merely *knowing* that the goods he sells, are to be disposed of in contravention of the fiscal laws of another country. It has never been said, that merely selling to a party who means to violate the laws of his own country, is a bad contract." In *Mo-Intyre v. Parks*, 3 Metc., 207, the consideration of the assignment of a promissory note, was the sale of lottery tickets in New York, authorized by the law of that State, but prohibited in Massachusetts, where they were to be sold, and where suit was brought. It was held that it was no legal objection to the validity of the contract, that the plaintiff knew when the lottery tickets were sold to defendant, that he intended to sell them in Massachusetts. In *Orcutt v. Nelson*, 1 Gray, 536, the suit was brought to recover the price of brandy, gin, rum, &c., sold and delivered to defendant by plaintiff. The defence was, that they were intoxicating liquors, sold contrary to the statute of Massachusetts, regulating the sale of intoxicating liquors, the defendant not being an agent appointed according to law, to sell the same for medicinal, chemical, and mechanical purposes. The evidence showed that the liquors were ordered by mail, of the plaintiff, doing business at Hartford, Connecticut, who filled the order, and shipped the goods to defendant, residing in Massachusetts. The law of that State provided, that "no action of any kind shall be had or maintained in any court of this commonwealth, for the recovery or possession of intoxicating liquors, or the value thereof, except such as are sold in accordance with the

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provisions of this act.” The court held that all sales not prohibited by the terms of the act, or by necessary implication from those terms, were to be deemed made in accordance with the act, and that a sale of liquors in Connecticut, without any fraudulent view to their re-sale in Massachusetts, contrary to law, was not unlawful, and that an action might be maintained in Massachusetts for the price of the liquors so sold.

The result of these decisions, (says Story’s Conflict of Laws, section 253), certainly is that the mere knowledge of the illegal purpose for which goods are purchased, will not affect the validity of the contract of sale of goods, intended to be smuggled into a foreign country, even in the courts of that country; but there must be some participation or interest of the seller in the act itself.

These are all the reported cases cited by the counsel, or met with in our researches, that go, even in appearance, to sustain the position assumed by the plaintiff. It is evident, however, that it is only in appearance that they sustain it. They do not go to the extent of holding, that if the goods are sold, as alleged in the answer of defendant, “with intent to enable the defendant to violate the laws of this State,” the contract is valid and enforceable here; but it will be seen that, if it at all enters as an ingredient into the contract between the parties, that the goods shall be smuggled, or that the seller shall do some act to assist or facilitate the smuggling, or to assist, or be instrumental in breaking the laws of another State or nation, the seller is deemed an active party, and the contract will not be enforced.

A case exactly in point is that of *Weymell v. Reid*, 5 Durnford & East, 599. The defendants applied to the plaintiff, a foreigner at Lisle, for a quantity of lace, which he knew was to be smuggled into England; and for that purpose, it was to be packed by plaintiff in a peculiar manner, by the direction of defendant, for the more easy conveyance of it without discovery. The defence to the suit was, that it was a smuggling transaction; and it was held,

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that as the plaintiff was concerned in giving assistance to the defendant to smuggle the goods, by packing them in a manner most suitable for, and with intent to aid that purpose, he cannot resort to the laws of England to assist him in carrying his contract into execution. The case did not rest merely in plaintiff's knowledge of the use intended to be made of the goods. If he undertook to deliver the goods in the manner shown, knowing the use intended to be made of them, he was offending against the laws of his country in the very contract itself. If the contract and delivery are complete abroad, and the seller does no act to assist in the illegal use to be made of the goods, the contract, it was held, would be valid, and might be recovered upon in England.

The cases of *Biggs v. Lawrence*, 3 Durnford & East, 454, and *Clugas v. Penaluna*, 4 Durnford & East, 466, were actions for the price of goods sold abroad, and packed in a certain way, to enable the defendant to smuggle them into England. The plaintiffs and defendants were English subjects. Though the contracts were made abroad, the court held, that they were to be considered as contracts made in England, and in direct violation of the laws of the country. Goods sold abroad, and delivered there in the fair course of trade, may be recovered for, though they be afterwards smuggled into England, (as in the case of *Holman v. Johnson*); but if the plaintiff assists in the act of smuggling, by packing the goods in a particular way, used for the purpose of smuggling, and with a view to evade the laws of the country to which they are to be exported, the whole transaction is tainted, and the seller cannot receive the aid of the laws of such country to recover their value.

A distinction made in the last named causes, between them and the cause of *Holman v. Johnson*, was, that in the former, the plaintiffs were English subjects, while in the latter the plaintiff was a foreigner. Subjects, it was held, should not be allowed to enforce in England, a contract in violation of the laws of their own country, though such a contract might be enforced in the like case by a foreigner.

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The true doctrine would seem to be, (says Story's Conflict of Laws, section 255), to make no distinction whatsoever, between the case of a sale between citizens or subjects, and the case of a sale between foreigners; but to hold the contract in each case to be utterly incapable of being enforced, at least in the courts of a country whose laws are thus designedly sought to be violated.

The case of *Lightfoot v. Lenant*, 1 Bosanquet & Pullen, 551, was a suit on a bond given to secure the payment of the price of goods, sold and delivered by the plaintiff to the defendant in London, to be shipped to Ostend, and thence re-shipped to the East Indies, to be trafficked with clandestinely, and without the license of authority of the East India Company, the plaintiff well knowing that the said goods were so to be trafficked with, and disposed of. The court held, that it being prohibited by the positive law of the country to furnish goods for such purpose, the contract was void. And although the prohibition attaches only on the person who has the immediate interest in the supply, and although those who are more remotely concerned in furnishing the supply, may not be directly within the scope of the act, it will not follow that their contracts are valid. Eyre, C. J., said: "Upon the principles of the common law, the consideration of every valid contract must be meritorious. The sale and delivery of goods—nay, the agreement to sell and deliver goods is, *prima facie*, a meritorious consideration to support a contract for the price. But the man who sold arsenic to one who he knew intended to poison his wife with it, would not be allowed to maintain an action upon his contract. The consideration of the contract, in itself good, is thereby tainted with turpitude, which destroys the whole merit of it. Other cases, where the means of transgressing a law are furnished, with knowledge that they are intended to be used for that purpose, will differ a shade more or less from this strong case. But the body of the color is the same in all. No man ought to furnish another with the means of trans-

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gressing the law, knowing that he intended to make that use of them."

The case of *Langton v. Hughes*, 1 Maule & Selwyn, 593, was for the price of certain drugs, sold by the plaintiff to a brewer, with the knowledge that they were for the purpose of being used in the brewery, contrary to law. Lord Ellenborough said: "A person who sells drugs with the knowledge that they are meant to be mixed, may be said to cause or procure, *quantum in ille*, the drugs to be mixed. What is done in contravention of an act of parliament, cannot be made the subject matter of an action. And although the case does not show that the drugs were, in fact, mixed, but they were sold with a view to be mixed; and the court will not give sanction to a contract entered into against the policy of the law."

In *Wetherell v. Jones*, 3 Barnwell & Adolphus, 225, Lord Tenterden said: "When a contract which a plaintiff seeks to enforce is expressly, or by implication, forbidden by the statute or common law, no court will lend assistance to give it effect. And there are numerous cases in the books, where an action on a contract has failed, because either the consideration for the promise, or the act to be done, was illegal, as being against the express provision of the law, or contrary to justice, morality or sound policy."

That the law is in accordance with the authority of these decisions, when the contract is sought to be enforced in the jurisdiction where it was made, we think there can be little reason to doubt. Does it make any difference, that the contract was consummated in Illinois, and was not prohibited by the laws of that State? If, as averred in the answer of defendant, the liquors were sold and shipped to defendant, with a view to enable him to violate the laws of the State of Iowa, we think the plaintiff cannot recover. No State is bound to lend the assistance of its courts, to enable a party to evade or contravene its laws, or to enforce a contract subversive of its policy or institutions. It can make no difference that the contract was valid in Illi-

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nois, and might have been enforced in the courts of that State.

The law of the place where the thing happens, (says Lord Mansfield), does not always prevail. In many countries, a contract may be maintained by a courtesan, for the price of her prostitution, and one may suppose an action to be brought here upon such a contract, which arose in such a country. But that would never be allowed in this country. Therefore, the *lex loci* cannot, in all cases, govern and direct. *Robinson v. Bland*, 2 Burrows, 1077, 1084. See also, *Greenwood v. Curtis*, 6 Mass., 358, 379, in which Parsons, C. J., says: "This contract, if lawful where it was made, could not be the legal ground of an action here; for the consideration is confessedly immoral, and a judgment in support of it, would be pernicious from its example."

By the prohibitory liquor law of the State of Iowa, the sale of intoxicating liquors, or the keeping of the same for sale within the State, is, under heavy penalties, prohibited, and the liquors, with the vessels in which they are contained, are declared to be a nuisance and subject to forfeiture, and when ascertained to be so kept, they may be ordered to be destroyed. By virtue of this act, the total prohibition of the manufacture and sale of intoxicating liquors, had become the settled policy of the State. *The State v. Geebrick*, 5 Iowa, 491. Whether the consideration of the contract of sale, in this instance, was immoral or not, there can be no question, that if made with intent to enable the defendant to sell the liquors within this State, in violation of our laws, it was opposed to the policy of the State, and cannot be enforced.

The State of Iowa, as an independent community, may judge and determine for herself, how far the obligation of comity to a neighboring State, renders it becoming in her to give effect to contracts made within such neighboring State, and valid there, but which may be prejudicial to her interests, and entered into with a view to the violation of her laws. This comity is, in all cases, a voluntary conces-

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sion on the part of the State by whom it is offered, and is inadmissible, when contrary to its policy, or prejudicial to its interests. *Bank of Augusta v. Earle*, 13 Peters, 589. The State, in the exercise of her rights, and in defence of her policy and interests, has chosen to declare that no action of any kind shall be maintained in the courts of the State, for the value of any intoxicating liquor sold in any other State, with intent to enable any person to violate the provisions of the act for the suppression of intemperance.

The plaintiff, by his demurrer, admits that the liquors were sold to the defendant, to enable him to violate this law of the State. It is claimed by him, however, that this provision of the law is unconstitutional and void, as operating to impair the obligation of contracts. The law was not intended to affect the obligation of contracts, in the sense in which these words are used in the constitution. This law was in force when the contract was made, and can, therefore, in no legal sense, be said to impair its obligation. Laws made subsequent to the formation of a contract, may certainly operate so as to impair its obligation. But laws made prior to the formation of the contract, cannot do so, because all existing laws enter into contracts when made under them, and define and determine that contract. 2 Parsons on Contrs., 537. The contract was so far made, in this instance, with reference to the law, that it appears from the pleadings, that it was entered into by the parties with a view to the violation of the law, which it is now argued impaired its obligation.

We think the demurrer was properly overruled, and the judgment of the district court will be affirmed.

Judgment affirmed.

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Where it is assigned for error, that the court erred in imposing terms in allowing an amendment of the pleadings, the party complaining must

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show that the court below abused the discretion properly given to it in such cases.

The order made by the inferior court, sustaining exceptions to the several parts of a deposition, should be distinctly shown, either by a formal entry, or by bill of exceptions, if it is expected that the appellate court will review the same.

Where each party took exceptions to certain depositions, and the court ordered that certain parts, "as shown and marked on the same, be excluded;" and where by reference to the depositions, there was nothing to indicate what parts were excluded, or what portions were intended to be, by the order of the court, but on the margin of some of the depositions, were lines and crosses, as if made with a pen; but when this was done, by whom, or what was intended thereby, did not appear from the record; *Held*, That the appellate court could not adjudicate upon the correctness of the ruling of the court below in relation to the depositions.

In chancery, correct practice requires that specific and distinct issues of fact should be submitted to the jury, that the conscience of the chancellor may be advised by the special verdict responsive to the issues thus made.

Where a county judge makes a deed under the act entitled "An act regulating the disposal of lands purchased in trust for town sites," approved January 22, 1858, the deed should be made to the person who, as an occupant, is entitled to the same, at the time the deed is made.

Where a complainant in equity claimed title to two lots in the city of Council Bluffs, and alleged that he, and those under whom he claims, had the right to said property, as occupying claimants, prior, and up to the time the land was entered by the county judge, under the act of Congress, entitled "An act for the benefit of citizens and occupants of the town of Council Bluffs, in Iowa," and approved April 6, 1854, and the laws of the State of Iowa, and at the time the said county judge conveyed the same to the respondents; that the possession of the respondents, if any they had, was by force and fraud, with a full knowledge of the rights of complainant; and that he was entitled to a deed from the county judge—all of which was denied by the answer; and where it appeared from the record that a jury was "impanelled and sworn, to well and truly try the present issue joined, and a true verdict render according to law and evidence," which jury returned a verdict as follows: "We, the jury, find that the defendants are entitled to the possession and occupancy of the lots of land in question, on the 6th day of April, 1854," and thereupon the court rendered a judgment as follows: "It is therefore considered by the court, that the plaintiff take nothing by his bill, and that the defendants have and recover of and from the said plaintiff their reasonable costs, and that execution issue therefor;" *Held*, That the verdict of the jury was on an immaterial issue, and settled nothing; and that the court erred in dismissing the bill.

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Appeal from the Pottawatomie District Court.

WEDNESDAY, OCTOBER 13.

IN CHANCERY. The bill claims title to two lots in the city of Council Bluffs. Complainant charges that he, and those under whom he claims, had the right to said property as occupying claimants, prior and up to the time the same was entered by the county judge, under an act of Congress and the laws of the State, and at the time the said county judge conveyed the same to respondents. The answer denies all the material allegations of the bill, to which there was a replication, and the cause heard upon depositions and exhibits.

The record shows that on the 21st of May, 1857, a jury was "impanelled and sworn to well and truly try the present issue joined, and a true verdict render, according to law and evidence." This jury returned the following verdict: "We the jury, find that the defendants are entitled to the possession and occupancy of the lots of land in question, on the 6th day of April, A. D. 1854." And then follows this judgment: "It is therefore considered by the court that the plaintiff take nothing by his bill, and that defendants have and recover of and from the said plaintiff their reasonable costs, and that execution issue therefor." Complainant appeals.

W. H. & J. A. Seevers, and *E. C. Stone*, for the appellant, cited 2 Daniels' Ch. Pr., 1340; *Ib.*, 1335; *Apthorp v. Comstock*, 2 Paige, 488; *O'Connor v. Cook*, 8 Vesey, 535; *Field v. Holland*, 2 Cond., 285; *McDaniel v. Marygold*, 2 Iowa, 500; 5 U. S. Stat. at Large, 657; Statutes of Iowa, 1853, 145; *Pierson v. David*, 1 Iowa, 23.

No appearance for the appellees.

WRIGHT, C. J.—Before coming to the consideration of

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what we regard as the material question in the case, one or two minor matters will be briefly noticed.

It appears that the case was once before submitted to a jury, and when the testimony was all closed, the defendants asked and obtained leave to amend their answer. This leave was given upon condition that they pay all costs to that time, and the cause continued, to which complainant objected. We are not satisfied that there was error in granting this leave. In the first place, there is nothing to show that the court below abused the discretion properly given to it in such cases. None of the circumstances are disclosed, and the case stands upon the simple fact, that the defendants, upon motion, had leave to amend their answer.

It appears that each party took exceptions to portions of certain depositions. The court ordered that certain parts, "as shown and marked on the same, be excluded." By reference to the depositions, we find nothing to indicate what parts were excluded, or what portions were intended to be, by the order thus made. On the margin of some of them, we find lines and crosses, as if made with a pen; but when this was done, by whom, or what was intended thereby, the record does not advise us. Under such circumstances, it would be quite unsafe to undertake to adjudicate or pass upon the correctness of the ruling made by the court below. The order made as to the several parts objected to, should be distinctly shown, either by the formal entry, or bill of exceptions, if it is expected that this court will review the same.

On the 6th of April, 1854, the Congress of the United States passed "An act for the benefit of citizens and occupants of the town of Council Bluffs, in Iowa," (Laws of 1853-4, 273), in which it is provided, that the county judge of Pottawatomie county is authorized to enter the lands upon which said town is situated, in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of said land, and the proceeds of the

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sale thereof, to be conducted under such rules and regulations as are prescribed by the legislative assembly of the State of Iowa, in an act entitled "an act regulating the disposal of lands purchased in trust for town sites, approved January 25, 1852, or as may hereafter be prescribed by the legislative assembly of said State." This act of Congress doubtless intended to refer to chapter 88 of the laws of 1853, and this is admitted in the argument. By this act, it is provided that whenever any portion of the surveyed public lands of the United States, within any organized county, has been, or should be, settled upon and occupied as a town site, it may be lawful, and shall be the duty, (if required by the occupants of such land), of the corporate authorities of said town, if incorporated, and if not, of the county judge of the county in which said town is situated, if furnished by said occupants with money sufficient, to enter at the proper land office, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests. It is then provided, that the corporate authorities, or county judge, after purchasing the land, shall make out, execute and deliver, to each person, who, as an occupant, may be entitled to the same, a deed in fee simple for such part or parcel as he or they may be entitled to, on the payment by the said occupant, of his proper and due proportion of the purchase money, and the expenses therein specified.

By virtue of these laws, the county judge of Pottawatomie county, entered the lands upon which the town of Council Bluffs is situated, and on the 2d of June, 1854, conveyed the lots in controversy to the respondents. Complainant, by his bill, avers that he was the occupant of these premises, or that he was entitled to the same, and that the possession of the respondents, if any they had, was by force and fraud, with a full knowledge of complainant's right; and that he was entitled to the deed from the county judge. This is denied by the answer, and to this question, all of the testimony was directed. It will be observed, however, that the jury found that respond-

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ents were entitled to the possession and occupancy of the premises, on the 6th of April, 1854, and upon this finding the district court dismissed the complainant's bill. In this, there was error.

It does not appear that any specific questions were submitted to the jury for their determination. The whole cause seems to have been given them, in utter disregard of the rules and principles governing proceedings in a court of equity. It no where appears, that the judge desired to take the opinion of the jury upon any question—or that he could not himself, sufficiently and satisfactorily, ascertain the truth in the premises. And the only circumstance that saves the submission itself from invalidating the finding, and the whole of the subsequent proceedings is, that it was made without objection, both parties being present. Correct practice requires that specific and distinct issues of fact should be submitted, that the conscience of the chancellor may be advised by the special verdict, responsive to the issues thus made.

But the finding of the jury in this case, settled nothing, and acting upon that alone, as the court below did, it was error to dismiss the bill. It settled nothing, for the reason that it is quite immaterial who was entitled to the possession and occupancy of these lots, at the time the act of Congress passed, to-wit: April 6th, 1854. And yet, this is all the jury found. The language of the law is, that the county judge shall make the deed to the person who, as an occupant, is entitled to the same—not to the person who was entitled to it on the day the act of Congress was passed, but at the time he is required to make the deed—at the time he proceeds to execute the trust. After this act passed, the possession of this property may have been changed; and though on the 6th of April, 1854, respondents were the occupants, they may have parted with it, by sale or otherwise to complainant, or any other person; and yet, under the verdict or judgment in this case, they could defeat their own sale. This was not the intention of the law. The question is, who, under the law and the facts,

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was entitled to the deed at the time the county judge proceeded to the discharge of his duty—should it then have been made to complainant, or respondents? If to complainant, then respondents are to be treated as his trustees, holding the property subject to his paramount equity, and they will be decreed to convey. If to respondents, then the bill should be dismissed.

As it is evident, therefore, that the cause was heard and determined upon an immaterial issue—an issue, the finding upon which determined nothing—the cause will be remanded for the further action of the court below.

Decree reversed.

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In an action of right, the defendant cannot, in his answer, set up a title for the plaintiff, and plead to it, and compel the plaintiff to take issue with him on the title thus set up.

In an action of right, it is the duty of the defendant to admit or deny the claim of the plaintiff, and to set up his own. Upon these respective claims and denials, they proceed to trial.

An answer in an action of right, which does not state what interest in, or title to the premises the defendant claims, as whether in fee simple or otherwise, is fatally defective.

Where a party claims title to real estate, by virtue of occupancy and actual adverse possession, he should aver what length of time and possession he relies upon.

A defendant in an action of right, is not obliged to set out the details of his title, but only what he claims; but where he undertakes to show his title, he should give it such definiteness that his adversary may be informed, and may be enabled to meet it.

Where a party claims title under the occupying claimant's act, he should show how that act creates a title originally, and facts and circumstances which show that the right could accrue to the party claiming the benefit of the act.

Where in an action of right the defendant answered, alleging that if plaintiff has any title to said land, it is based upon, and derived from, a certain decree of partition, made in the district court of Iowa terri-

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tory, in Lee county, on the 8th day of May, 1841, in a suit wherein J. S. *et al.* were plaintiffs, and E. A. *et al.* were defendants, and that the said decree of partition was illegal, fraudulent and void, for the reasons following—setting out seventeen reasons; and where the defendant further pleaded, that he held the said lands by right of occupancy and actual adverse possession, “for the length of time limited by law,”—by genuine title, derived from an original half-breed Indian, of the Sac and Fox tribe of nations—and by title derived by virtue of the occupying claimant’s law, from the State of Iowa—and denied waste and cutting timber, and that defendant was liable in any manner; and where the plaintiff demurred to the answer, for the following reasons: 1. The defendant cannot thus set up a title for the plaintiff, and compel him to take issue upon it; 2. The decree of partition cannot be thus impeached collaterally; 3. The statute of limitations, if relied upon, is not so pleaded as to be available, and defendant should state how long he has been in possession—which demurrer was sustained. *Held*, That the demurrer was properly sustained.

Appeal from the Lee District Court.

WEDNESDAY, OCTOBER 13.

The appellee brought his action to recover the southeast quarter of section 18, township 65, north of range 5 west, claiming title and the right to possession. The defendant answers, alleging that if plaintiff has any title to said land, it is based upon, and derived from, a certain decree of partition, made in the district court of Iowa territory, in Lee county, on the 8th of May, 1841, in a suit wherein Josiah Spaulding *et al.* were plaintiffs, and Euphrosyne Antaga *et al.* were defendants; and that the said decree of partition was illegal, fraudulent and void, for the reasons following; setting forth seventeen reasons why the decree is invalid. He then pleads farther, that he held the said lands by right of occupancy and actual adverse possession, “for the length of time limited by law,” by genuine title derived from an original half-breed Indian, of the Sac and Fox tribe of nations, and by title derived by virtue of the occupying claimant law, from the State of Iowa; and denies waste and cutting timber, and being liable in any manner.

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To this answer, plaintiff demurred : 1. Because defendant cannot thus set up a title for plaintiff, and compel him to take issue upon it; 2. Because the decree of partition cannot be thus impeached collaterally; 3. Because the statute of limitation, if relied upon, is not so pleaded as to be available, and the same is no bar; and the defendant should state how long he has been in possession. The defendant afterward withdrew that part of his answer which denied and traversed the allegations of the petition, or any of them. The demurrer was sustained, and the defendant refusing to answer over, judgment was rendered that plaintiff recover the possession of the land described. The plaintiff withdrew his claim of damages for use and occupancy. The defendant appeals.

F. Semple, for the appellant.

Rankin, Miller & Enster, and *Charles Mason*, for the appellee.

WOODWARD, J.—There cannot be a doubt, we think, but that the defendant's answer is defective in substance, in the first and main portion of it; and the reason for this opinion is contained in the plaintiff's first cause for demurrer—that is, that the defendant cannot set up a title for the plaintiff and plead to it, and compel the plaintiff to follow him. If the petitioner should take issue upon the allegation that such is his title, it would be but an immaterial issue, trying the question by what line of title he claims, and not the strength of the title. The plaintiff must be at liberty to offer such proof, or source of title, as he may have. The defendant's duty is to admit or deny the plaintiff's claim, and to set up his own. Upon these respective claims and denials, they proceed to trial.

This answer is of so unusual a character, that we are hardly prepared to say, what rules of pleading it violates—it is not readily classified. There is one, however, which clearly it does not meet. It does not directly an-

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swer the petition. This it does argumentatively or hypothetically only.

The grounds alleged as rendering the decree invalid, are not now considered. When they come up properly, the question will be, whether they do render the judgment void, as claimed; and then some of them might be found affecting certain parties only, and some rendering it not binding on certain ones, for want of notice, or because they were not made parties, or whatever the reason might be, but yet going to a part only. The plaintiff does not demur to the specific reasons assigned for its invalidity, but proceeds upon the supposition that the answer is, in the above respect, legally bad, even admitting the truth of the facts averred, and the effect of them assumed by defendant, if properly pleaded, and it is upon this ground that we concur in sustaining the demurrer. The defendant had not arrived at a position in his cause, in which he could plead those facts. He cannot take it for granted that the plaintiff has one, and only one, basis of claim, and set this up for him, and then plead to it.

The remaining matters alleged in the answer, are also defectively pleaded in substance. The defendant does not state what he claims, whether a fee simple or otherwise. He does not state distinctly that he asserts his right by virtue of an adverse possession. But admitting this particular to be sufficient, still, he does not aver what length of time and possession he relies upon. This part of the answer fails in every requisite of form and substance. In the next step, he claims to hold, as we suppose it means, by a title derived from a half-breed Indian, not naming him. He is not obliged to set out the detail of his title, but only what he claims; but if he undertakes to show his title, he should give it such definiteness, that the adversary may be informed, and may be enabled to meet it. The claim under a half-breed Indian, leaves his opponent loosely afloat and in darkness. If he aims to deny, he does not know what he is denying. The third ground for defendant's supposed title, is under the occupying claim-

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ant's law, but he sets out no facts or circumstances upon which a right could accrue. And further, the pleading does not show us how that law creates a title originally.

The answer is wanting in material matters, and the court was correct in sustaining the demurrer. The judgment is therefore affirmed.

RUSCH v. THE CITY OF DAVENPORT.

The City of Davenport, in its corporate capacity, is liable for an injury resulting from the defective condition of its streets and bridges.

Under sections four and five of the act entitled "An act to amend an act entitled 'An act to incorporate the city of Davenport,' approved January 22, 1855, there is no road district distinct from the city; nor has the city an existence as a corporation, distinct from its existence as a road district.

A court need not adopt the language of counsel, in charging the jury. It may put aside the instructions asked, and charge the jury in its own language; and the party can only assign for error the incorrect ruling of the court upon the law.

In an action for damages resulting from an injury occasioned by a defective road or bridge, the plaintiff, to entitle him to recover, must not only show some negligence on the part of the defendant, but ordinary care and diligence on his own part.

The reasonable care to be shown by the plaintiff in such a case, need not be directly shown, but may be inferred by the jury from the circumstances of the case.

The degree of care required of the plaintiff in such a case, is such care as persons of common prudence generally exercise; and whether he has exercised such degree of care, is a question of fact, or a mixed question of law and fact, to be determined by the jury under the direction of the court,

Negligence is the omitting to do something that a reasonable person would do, or the doing something that a reasonable person would not do.

Where in an action to recover damages for an injury occasioned by a defective bridge, the court instructed the jury that if the plaintiff knew of the defect, or could have seen the same, by the exercise of ordinary care, and that if he imprudently and carelessly drove his horse upon the bridge, and the accident occurred in consequence of such imprudence and carelessness; or if the accident could have been avoided,

6	443
80	408
6	443
91	217
6	443
109	638
6	443
131	578
6	443
133	329
6	443
136	669

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by the exercise of ordinary care and prudence, they must find for the defendant; *Held*, That the instruction was correct.

Where in an action for damages for an injury resulting from a defective bridge, the defendant asked the court to instruct the jury as follows: "That the plaintiff having sued the defendant for damages, the burden of proof is upon him to make out a case, and he is not entitled to recover, unless he has shown, not only the defect in the bridge or crossing, and the injury, but also, in addition to these facts, that the accident did not happen in consequence of the want of ordinary prudence and care on his part," &c.; which instruction the court refused, and instead thereof, charged the jury substantially as follows: "That they must be satisfied that a defect existed in the bridge, which defendant was bound to keep in repair, and that the accident happened in consequence of the defect; that if they believe the bridge was so defective as to be unsafe for crossing; that the plaintiff, in attempting to cross, used ordinary care and prudence; and that the accident happened in consequence of the defect, they must find for the plaintiff; but that if the defect was manifest and apparent; if plaintiff knew of the defect, or could have seen the same, by using ordinary care and prudence, and imprudently and carelessly drove his horse upon the same, and the accident happened in consequence of such imprudence and carelessness; or if the accident could have been avoided by the exercise of ordinary care and prudence, they must find for the defendant;" *Held*, That while the court did not, in so many words, charge the jury that the burden of proof was upon the plaintiff to show that the accident happened without any want of reasonable care on his part, yet, that the instruction given, amounted in effect to such ruling.

The term bridge embraces every structure in the nature of a bridge over any obstruction to the highway, whether a river, ditch, or other passage for water.

Although a road district may not be obliged to keep the whole of a highway, from one boundary to another, free from obstructions, and fit for the use of travelers, yet as convenience and safety are the essential conditions of a well-maintained highway, both at common law and by statute, if a bridge is built of greater width than is required by the statute, where the exigencies of travel seem to require it, it must be kept in good condition for its whole width.

Where a city digs a ditch, and covers it at the street crossing with boards, for the whole width of the street, it is the duty of the city to keep it in a suitable condition for crossing upon any part of it.

The necessities of travel may require a bridge to be wider than sixteen feet; and section 517 of the Code, which provides that "bridges are parts of the public highways, and must be not less than sixteen feet," does not mean that a road district is, in no case, required to construct its bridges more than sixteen feet wide.

Where in an action against a road district for the recovery of damages,

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for an injury resulting from a defective bridge, the defendant asked the court to instruct the jury substantially as follows: "That the city of Davenport, as a road district, was not bound to keep the bridge in a suitable condition for crossing, for a greater width than sixteen feet," which instruction was refused; *Held*, That the court properly refused the instruction.

Appeal from the Scott District Court.

WEDNESDAY, OCTOBER 13.

This action was brought to recover damages for an injury to the plaintiff and his wife, caused by a defect in a bridge over a culvert in one of the streets in the city of Davenport. The petition alleges that the defendant is a corporation; that by the act of incorporation, the said city is constituted a road district; that within said city is a street or public highway, called Harrison street, and another street or public highway, crossing the same, called Third street; that the plaintiff and his wife, on or about the 6th day of August, 1855, were riding in a wagon drawn by one horse, going from Third into Harrison street, at the crossing thereof, where there is a bridge over a culvert; that by reason of a hole, or defect in the plank or planks of said bridge, his horse fell with his feet through said hole in said bridge; that by reason of the defect in said bridge, the plaintiff's wagon was upset and overturned, and both the plaintiff and his wife were thrown from said wagon, and greatly bruised, cut and wounded; that thereby both the plaintiff and his wife, were sick, sore, and disabled for a long space of time, during which time the plaintiff was hindered from his business, and his wife was hindered from serving him; and that by reason of the premises, the plaintiff was put to great expense in and about the curing of himself and wife, and otherwise greatly injured.

The answer of the defendant, after denying the material allegations of the petition, alleges that said bridge was thirty-two feet in length up and down Harrison street, across

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the centre of Third street, and of sufficient width to span the said gutter; that there were no holes in said bridge, extending sixteen feet either way, from the centre of said Third street, nor did the plaintiff's horse step into any hole on said thirty-two feet of bridging; that if plaintiff's horse got into any hole, and thereby the plaintiff and his wife were injured, it was owing to the carelessness of the said plaintiff in driving across said bridge; that if plaintiff and his wife were injured, in consequence of their horse getting into a hole near the spot named, it was a hole in the side-walk on one of said streets, where the horse went in consequence of the unskillfulness of the driver; that there was on said street a good, sound and whole bridge, twice the width required by law; and that if plaintiff and wife were injured in manner and form as alleged, it was in consequence of plaintiff having a vicious and unmanageable horse. To this answer the plaintiff replied, denying the new matter set up, and averring that the place where the plaintiff's horse fell into the hole and upset the plaintiff's wagon, was in another part of said street, where the defendant had built a wooden crossing over a culvert or ditch, made by defendant, to drain the water down Harrison street to the Mississippi river, and the accident occurred on a part of said street where the public were accustomed to, and had a right to pass and re-pass. Rejoinder by defendant, denying that the accident occurred in a part of said street which was the accustomed place of driving across said ditch by the public.

The court, on its own motion, among other things, charged the jury as follows:

I. If the jury are satisfied from the evidence, that the defendant laid out, opened and established Third street eighty feet in width, and worked and prepared the centre of said street, from gutter to gutter, so that the public could travel upon the same, and with the apparent design and intention, that the same should be so used with teams and carriages, it was the duty of said defendant to keep all that portion of said street, so worked and prepared, in

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such condition as to be safe for the public to so use and travel upon.

II. If the jury believe that defendant dug a ditch across Third street, and along the line of Harrison street, the whole width of the worked and traveled part of Third street, and bridged said ditch with plank the width of said street, in that case, it was the duty of defendant to keep said bridge in repair the whole width of Third street, so that it would be safe for the public to pass and repass with their teams, upon any part of the same.

III. If the jury believe said bridge so constructed, was defective in any part of it, so as to render it unsafe for people to travel over the same with their teams, and the plaintiff attempted to cross the same, and used ordinary care and prudence in so doing, and that the accident happened in consequence of said defect, then the defendant is liable in this action, and the plaintiff is entitled to recover.

IV. In determining what is ordinary care and prudence, the jury will take into consideration the place where the plaintiff started—his manner of starting—the character of the horse which he drove—and whether, under all the circumstances, he conducted as men generally would, and whether the care which he exercised, was, upon the whole, proportionate to the probable danger of injury that was before him.

V. If, under the instructions and the evidence, the jury should be of opinion that the accident occurred in consequence of a defect in the bridge, which defendant was bound to keep in repair, and that the plaintiff used such care, skill, and prudence as men ordinarily exercise under such circumstances, they will return their verdict for the plaintiff.

VI. But if the jury believe from the evidence, that the defect was manifest and apparent, and that the plaintiff knew that said defect existed, or could have seen the same, by using ordinary care and prudence, and imprudently and carelessly, drove his horse upon the same, and the ac-

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cident happened in consequence of the imprudence and carelessness of plaintiff; or if the accident could have been avoided, by the exercise of ordinary care and prudence on the part of the plaintiff; or if the jury believe that the accident occurred, not in consequence of the defect in the bridge, but by reason of the short turn which the horse made in turning from Third into Harrison street, then the defendant is not liable.

To these instructions the defendant excepted, and asked the court to instruct the jury as follows :

I. That the plaintiff in this case, is not entitled to recover, and it will be the duty of the jury to find a verdict for the city, unless the jury are satisfied from the evidence: 1. That there was a hole or defect in the bridge; and 2. That the plaintiff used proper and ordinary care in driving; and the jury must be satisfied from the evidence of both of these facts, before they can return a verdict in favor of the plaintiff.

II. That the plaintiff having sued the defendant for damages, the burden of proof is upon him to make out a case, and he is not entitled to recover, unless he has shown, not only the defect in the bridge or crossing, and the injury, but also, in addition to these facts, that the accident did not happen in consequence of the want of ordinary prudence and care on his part. The court repeats to you that it is incumbent on the plaintiff, to satisfy the jury that the accident did not happen from his neglect; and if the plaintiff has failed, from the whole testimony, to satisfy the jury on this point, he has failed to make out a case and cannot recover.

III. That if Third street is eighty feet wide, and if twelve feet on each side was appropriated for foot passengers; and if four feet on each side, next to the side-walks, are appropriated for gutters; and if the forty-eight intervening feet, passing over Harrison street, were well bridged, and was the place where the great proportion of the wagons traveled; and if the place where the plaintiff

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crossed was not designed to be crossed by wagons; and if persons of ordinary care would not have attempted to cross where the plaintiff did, or if attempting to cross there, could have done so in safety, by the exercise of ordinary skill in driving, you will find a verdict for the defendant.

IV. That the plaintiff cannot maintain this action against "The City of Davenport," in its corporate capacity; it should have been against "The Road District."

The court refused to give the instructions asked by defendant, to which refusal he excepted. The jury returned a verdict for the plaintiff, and assessed his damages at one thousand dollars. Motions for a new trial and in arrest of judgment, were made and overruled, and judgment entered on the verdict. The defendant appeals, and assigns for error the instructions given by the court to the jury, and the refusal to give those asked for by the defendant.

Cook, Dillon & Lindley, for the appellant, in support of their views, cited *Brown v. Maxwell*, 6 Hill, 592, and cases there cited; *Rathbun v. Payne*, 19 Wend., 401; *Williams v. Holland*, 6 Carr & Payne, 23; *Pluckwell v. Wilson*, 5 Ib., 375; *Smith v. Smith*, 2 Pick., 623; *Lane v. Crombie*, 12 Ib., 177; *Butterfield v. Forrester*, 11 East, 61; *Harlow v. Humister*, 6 Cow., 191; Laws of 1855, sec. 4; Laws of 1853, 88; Code, sec. 517; *Howard v. Bridge-water*, 16 Pick., 189.

James Grant, for the appellee, relied upon *Beers v. H. R. R. Co.*, 19 Conn., 566; *Barber v. Essex*, 1 Williams C. P., 62; *Providence v. Clapp*, 17 How., 161.

STOCKTON, J.—The first question suggested, is whether the suit should not have been against the road district as defendant, instead of the city of Davenport.

The act of January 22, 1853, provides, that "every road district shall be responsible for all damages sustained by any person, in consequence of defects in the roads and

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bridges in said district.” Section 17. Although road districts are thus made liable for damages resulting from the defective condition of their roads and bridges, yet, as they have not been made corporate bodies, as counties and school districts have been, and as no express provision is made for their being sued, a question might be well made, whether a suit can be brought against a road district, as defendant, by virtue of the above recited provision. Without determining this question, however, we think the suit in this instance, was properly brought against the city.

The act of January 22, 1855, provides, that “the city of Davenport shall constitute one road district, to be under the control and superintendence of one or more street commissioners, to be appointed by the city council.” Session Acts, chapter 57, section 4. Something more was intended by this act, than merely to define the boundaries of a road district, and to declare that the same should be co-extensive with the limits of the city of Davenport. The city as incorporated, is by it constituted a road district, with all the liabilities of other road districts. Power is given to it of appointing its own commissioners, or supervisor of roads, and of receiving all taxes for road purposes, levied by the county authority upon the property within the city; which it is required to expend upon the streets of the city, and the roads leading to it. Act of 1855, sections 4 and 5. We think that there is no road district distinct from the city. The boundaries of the road district are the boundaries of the city. The city has not an existence as a corporation distinct from its existence as a road district, and no different liability is created. The city is withdrawn from the operation of the general road law, so far as to take away from the township trustees, the power of subdividing it into road districts, and appointing supervisors of roads. The city is made one district, with the power of appointing its own officers. Act of January 22, 1853, sections 1 and 2.

The court was asked by defendant to charge the jury

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that "the plaintiff must show, not only the defect of the bridge, and the injury resulting therefrom, but he must further show that the accident did not happen from his own negligence." The court refused to give the instruction as asked, and instead thereof charged the jury as follows: "That they must be satisfied that a defect existed in the bridge, which defendant was bound to keep in repair, and that the accident happened in consequence of the defect; and if they believe the bridge was so defective as to be unsafe for crossing; that the plaintiff in attempting to cross used ordinary care and prudence, and that the accident happened in consequence of the defect, they must find for the plaintiff; but if the defect was manifest and apparent—if plaintiff knew of the defect, or could have seen the same, by using ordinary care and prudence, and imprudently and carelessly drove his horse upon the same, and the accident happened *in consequence of such imprudence and carelessness*—or if the accident could have been avoided, by the exercise of ordinary care and prudence, they must find for the defendant."

It is not important that an instruction should be given in the very language in which it is asked; if given in substance, it is sufficient. The court need not adopt the language of the counsel, in charging the jury. It may put aside the instructions asked, and charge them in its own language; and the party can only assign for error, its incorrect ruling of the law. The court must, of course, be permitted to choose the language in which his charge is given.

We think there is no doubt, but that the burden of proof was on the plaintiff to show to the jury, that the accident happened without any want of reasonable care on his part. Whether the action be at common law, against an individual, for placing an obstruction in a highway, whereby the plaintiff has suffered damages, or under the statute, against the town or road district, for injuries sustained by reason of some defect or want of repair; in either case, the plaintiff in order to recover, must show

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that he did not contribute to the injury by his own fault, or by the want of ordinary care. Angell on Highways, Section 290.

In *Butterfield v. Forrester*, 11 East, 60, Lord Ellenborough said: "Two things must concur to support this action; an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it, on the part of the plaintiff."

In *Smith v. Smith*, 2 Pick., 623, the court says: "It cannot be maintained, unless the plaintiff can show that he used ordinary care; for, without that, it is by no means certain that he himself was not the cause of his own injury." "Where he has been careless, it cannot be known whether the injury is wholly imputable to the obstruction, or to the negligence of the party complaining."

In *Lane v. Crombie*, 12 Pick., 177, the court say: "We consider the rule to be now well settled, that to enable the plaintiff to recover, under such circumstances, he must not only show some negligence on the part of the defendant, but ordinary care and diligence on his own part."

In *Harlow v. Humister*, 6 Cowen, 189, the court say:—"Negligence by the defendant, and ordinary care by the plaintiff, are necessary to sustain the action."

The rule laid down in *Butterfield v. Forrester*, has been qualified by later decisions, in which it has been held that it did not hold good where the plaintiff, though negligent, could not, by the exercise of ordinary care, have avoided the injury. *Bridge v. G. I. Railway Co.*, 3 M. & W., 264. Nor where the fault of the defendant concurred with that of the plaintiff to produce the injury. *Davies v. Mann*, 10 M. & W., 545. Nor where, though there has been mutual neglect, the evidence shows intentional wrong. *Brownell v. Hagler*, 5 Hill, 282.

Although the burden of proving the exercise of ordinary care, rests on the plaintiff, yet it need not be directly shown, and may be inferred by the jury from the circumstances of the case. *French v. Brunswick*, 8 Shepley, 29; *Foter v. Dixfield*, 6 Ib., 380; *Coff v. Standish*, 2 Ib., 198.

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In *Lane v. Crombie*, the court, after charging the jury as stated above, further directed them, that the burden of proof was upon the plaintiff to show negligence in the defendant, that being the gist of the action; but that when, the defendant relies upon the fact that the plaintiff conducted himself carelessly, the burden of proof was upon the defendant, to show that the plaintiff had not used ordinary care. The latter part of this direction was held to be incorrect in point of law, the court saying that the burden of proof was upon the plaintiff, to show that the accident was not occasioned by her own negligence. 12 Pick., 177.

The district court, in this case, did not, in so many words, charge the jury that the burden of proof was upon the plaintiff, to show that the accident happened without any want of reasonable care on his part; yet, the instruction given, amounts in effect to that. The court, indeed, says nothing as to the burden of proof; but the jury are directed, that in order to find for the plaintiff, they must believe from the evidence, that in attempting to cross the bridge, he used ordinary care and prudence; that if plaintiff knew of the defect, or if it was apparent, and could have been seen by him, with ordinary care and prudence, and he imprudently and recklessly drove his horse upon the same, and the accident happened in consequence of such imprudence and carelessness; or if it could have been avoided by the exercise of ordinary care and prudence, they must find for the defendant.

We think the defendant cannot reasonably complain of this charge of the court. It clearly places upon the plaintiff, the burden of showing the exercise of reasonable care and prudence, before he can recover. To constitute error, it should appear that the court required the defendant to assume this burden on himself. No such fact appears by the record. After the evidence on both sides was given to the jury, the question of the burden of proof does not seem to us to have been of any practical importance. The reasonable care to be proved by the plaintiff, as before re-

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marked, need not be directly shown, and may be inferred by the jury from the circumstances of the case. Angell on Highways, section 290; *Thompson v. Bridgewater*, 7 Pick., 188.

The degree of care required by the plaintiff, was such care as persons of common prudence generally exercise; and whether he had exercised such degree of care, was a question of fact, or a mixed question of law and fact, to be determined by the jury, under the direction of the court. Negligence is the omitting to do something that a reasonable person would do, or the doing of something that a reasonable person would not do. Consequently, we think the court correctly charged the jury, that if the plaintiff knew of the defect, or could have seen the same, by the exercise of ordinary care; and that he imprudently and carelessly drove his horse upon the bridge, and the accident occurred in consequence of such imprudence and carelessness; or if the accident could have been avoided, by the exercise of ordinary care and prudence, they must find for the defendant. There may have been negligence in the defendant, in suffering the bridge to be out of repair, as well as in the plaintiff, in driving over it without reasonable care; from either of which causes, the accident might have resulted. An accident may happen with the most careful driver, if the defect is in the bridge; and though the bridge may be in a complete state of repair, even its completeness may be no sufficient security against reckless, or even careless driving.

By the sixth instruction of defendant, the court was asked to charge the jury that, "the city of Davenport, as a road district, was not bound to keep the bridge in suitable condition for crossing, for a greater width than sixteen feet." In support of the correctness of this instruction, the defendant cites section 517 of the Code, which provides that "bridges are parts of the public highways, and must be not less than sixteen feet wide." The district court, however, refused to give the instruction, and we

think not incorrectly. The term bridge, is a comprehensive one, and embraces every structure in the nature of a bridge, over any obstruction to the highway, whether a river, ditch, or other passage for water. Angell on Highways, section 35, 37. Where the statute, however, says that a bridge must not be less than sixteen feet wide, we are not to understand that the road district is in no case required to construct its bridges more than sixteen feet wide. The necessities of travel may not, in some instances, require the bridge to be wider. A bridge, like a road, which would be safe and convenient in the country, might be totally unsafe and inconvenient in the city. And this distinction as to width, must apply to other conditions of the bridge, or street. A street in a crowded city, thronged with carriages, wagons, and carts, with other streets crossing the same, and all used for purposes of travel and transportation, by vehicles going necessarily at different rates of speed, would furnish very inadequate accommodation for the demands of commerce and business, if supplied with a bridge only sixteen feet wide. Angell on Highways, section 259. And although a road district may not be obliged to keep the whole of a highway, from one boundary to another, free from obstruction, and fit for the use of travelers, as was held in *Howard v. N. Bridgewater*, 16 Pick., 189 ; yet, as commerce and safety are the essential conditions of a well maintained highway, both at common law and by statute, if a bridge is built forty-eight feet wide, where the exigencies of travel seem to require it, it must be kept in good condition for its whole width. Such was the ruling of the court in this instance. And the rule of law, as applied to a bridge over a water course upon a road little frequented, is stronger in a city, or on a road much traveled, and particularly under the circumstances as put by the court—that if the defendant had dug the ditch to drain the surplus water to the Mississippi river, and had covered the ditch at the street crossing with boards, for the whole width of the street, it was the duty

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of the city to keep it in a suitable condition for crossing upon any part of it.

This obligation of the road district, extends not only to the ordinarily traveled path of the highway, but also to the gutters and margins, and in cities, to the sidewalks. Angell on Highways, section 260. Certainly, if the defendant dug the ditch, for its own convenience, across a public street, it was its duty to provide a safe and convenient crossing for it, and to keep it in repair throughout that part of the street used for travel. If the ditch was bridged for the whole width of the street, travel was invited upon it for the whole extent of the bridge. It is no sufficient answer to say, that sixteen feet in the center of the bridge was in good repair, if the remainder was defective. The city is not only bound to keep the bridge in good repair as far as it is built, but it must afford a safe and convenient crossing for the ditch, for the whole width of the street.

Judgment affirmed.

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It is not necessary that the verdict of a jury, whether rendered in open court, or sealed up and handed to the clerk, should be signed by the jurors.

At the close of a trial, the parties agreed that the jury might seal up their verdict, and hand it to the clerk, and thereupon the court adjourned until next morning. During the adjournment the jury returned and delivered to the clerk their verdict, finding for the plaintiff, but it was not signed by either of the jurors. On the next morning the verdict was read, and the defendant's counsel objected to the same, because it was not signed by the jurors. The jury was then re-called, in open court, into the box; and again, without objection by either party, retired to sign their verdict. After being out some time, they sent a written statement to the court, signed by all the jurors, to the effect that they could not agree upon a verdict. They were brought into court and asked, if the verdict sealed up by them and delivered to the clerk, was not their verdict at the time, to which several of the jurors replied, and all assented, saying that it was their unanimous verdict, and assented to by all the jurors, at the time it was sealed and

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delivered to the clerk. The jury was then discharged, and plaintiff moved for judgment on the verdict so sealed and handed to the clerk, which motion was overruled. *Held*, 1. That the plaintiff was entitled to judgment upon the verdict as returned, in the first instance, by the jury; 2. That the jury, after their separation, could not be allowed to say, that it was not their verdict; 3. That the fact that the plaintiff did not object to the jury going out to sign their verdict, did not conclude him from moving for judgment on the original verdict.

Appeal from the Marion District Court.

WEDNESDAY, OCTOBER 13.

In this case, the parties agreed that the jury might seal up their verdict and hand it to the clerk, and thereupon court adjourned until the next morning. During the adjournment, the jury returned and delivered to the clerk their verdict, finding for the plaintiff in the sum of six hundred and sixty-six dollars, but it was not signed by either of the jurors. On the next morning, this was read, and "defendant's counsel objected to the same, because it was not signed by the jurors, whereupon said jury was recalled, in open court, into the box; and again, without objection by either party, retired to sign said verdict." After being out sometime, they sent a written statement to the court, signed by all the jurors, to the effect that they could not agreed upon a verdict. They were then brought into court and asked, "if the verdict sealed up by them and delivered to the clerk, was not their verdict at the time, to which several of the jurors replied, and all assented, saying that it was their unanimous verdict, and assented to by all the jurors at the time it was sealed and delivered to the clerk." The jury was then discharged, and plaintiffs moved for a judgment on the verdict so sealed and handed to the clerk, which motion was overruled, to which they excepted, and now appeal.

J. E. Neal, for the appellant.

Geo. May, for the appellee.

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WRIGHT, C. J.—Plaintiffs were entitled to judgment upon the verdict, as returned in the first instance by the jury. The Code provides that, when by consent, the jury have been permitted to seal their verdict, and separate before it is rendered, such sealing is equivalent to a rendition and recording thereof in open court; and that “the jury shall not be polled, nor shall they be permitted to disagree thereto, unless such a course has been agreed upon between the parties.” The verdict may be general or special, in actions for the recovery of money, or specific real or personal property—must be in writing, filed with the clerk, and entered upon the record, after having been put in form by the court, if necessary. The form is sufficient, if it expresses the intention of the jury. Sections 1785, 6, 9—90.

It is not required that the verdict shall be signed, whether rendered in open court, or sealed and handed to the clerk. If this verdict had, therefore, been returned when the court was in actual session, it must have been sufficient; and the plaintiffs could properly have insisted upon their right to a judgment for the amount thus found. The jury, however, by agreement, sealed their verdict, handed it to the clerk, and separated. This was equivalent to the rendition and recording thereof in open court. The jury could not afterwards be polled, nor be permitted to disagree, for this right was not reserved by the agreement of the parties.

It is said, however, that neither party objected to sending the jury out the second time, and that it was too late for plaintiff afterwards to insist upon their right to a judgment. It seems to us, however, that this failure to object, should not be construed to extend beyond its legitimate purport and meaning, and that it would be thus extended, to say that plaintiffs were concluded thereby, from subsequently moving for judgment upon the verdict. The most that their failure to object can mean, in our opinion, is, that they were willing that the jury should retire to

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sign the verdict, but not for any other purpose. To say that they assented to anything more, would contradict the plain language of the record. If it appeared that the jury were sent out to further consider of their verdict generally, and to this plaintiffs did not object, they might be concluded. Having consented, however, that they should retire for a particular purpose—to do that which was unnecessary, and not essential to the validity of the verdict—they ought not to be deprived of the benefit of the finding by the jury, in the first instance, because they took it upon themselves to again examine the case. The jury had nothing to do with the amount of the verdict. They had no power to disagree, or to bring in any other or different verdict. The conduct of the jury seems to be inexplicable, upon any fair reasoning. The law, in providing that a jury under such circumstances, should not be permitted to disagree, had a wise object in view. The object and policy of such provision, will be found clearly stated in *Cook, Sargent & Cook v. Sypher*, 3 Iowa, 487. And in this case, the policy and necessity of it, as well as the strong equitable right of plaintiffs to their judgment, is shown from the fact that the jurors, when brought into court the second time, all, either openly or tacitly, asserted that the writing sealed and handed to the clerk was, at the time, their unanimous verdict. We think that reason, as well as the clear language of the law, forbids that they should, after their separation, be allowed to say it was not their verdict.

The judgment is reversed, and cause remanded with instructions to enter judgment upon the verdict.

REYNOLDS v. MILLER.

Where in an application to the district court, for the allowance of an appeal from the decision of the county court, granting letters of administration to M., on the estate of R., made by the heirs of R. and

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others interested in his estate, it appeared that R. died in 1887, a non-resident of the State; that no administration was granted on his estate in this State, until May, 1855, when the defendant, M., applied for, and was appointed administrator; that the said heirs and others had no notice of the intention of M. to apply for letters; and that they had no knowledge of the grant of such letters, until after the expiration of the thirty days allowed for appeal, which application was made within sixty days after the appointment of M.; *Held*, That the petition showed good ground for an appeal, as well as that the failure to take it in time, was without fault on the part of the petitioners.

Appeal from the Lee District Court.

WEDNESDAY, OCTOBER 13.

Application to the district court for the allowance of an appeal from the order of the county court, granting to Peter Miller, letters of administration on the estate of Otis Reynolds, deceased. The defendant demurred to the petition, which demurrer was sustained, and the petitioners appeal. The facts of the case are fully stated in the opinion of the court.

Rankin, Miller & Enster, for the appellants, in support of their views, cited the following authorities: Code, sec. 1272; 3 Gillman, 420; Code, sec. 1325; 9 Gill, 299; 1 Hill, 326; 4 Conn., 219; Code, sec. 1673; *Ib.*, sec. 1314.

George C. Dixon and *Daniel F. Miller*, for the appellee.

This is a petition for an allowance of an appeal after the thirty days have elapsed. The allegation is, that petitioners had no notice or information of such appointment, and the petition is sworn to by L. F. Miller, alone. Two objections are made to this allegation: 1. Some of the petitioners might have had such notice, and yet the averment be true, that all of them did not have such notice; 2. Miller alone swears to such want of notice. Now, such knowledge was purely personal in its character, and the affiant could not, in the nature of things, speak for any

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other except himself. All the others may have had full notice—personal notice—and yet he not know the fact. The law regulating appeals will be found in the Code, sections 131 and 134.

But if they have alleged a sufficient excuse, does the petition upon its merits—admitting any fact which is well pleaded to be true—present such a case as entitles them to relief?

I. The regularity of the appointment of Miller as executor, is not controverted. By virtue of that appointment, he became vested with power over all the estate of O. Reynolds, deceased, which was in Lee county, so far as administration is concerned. The Code, (section 1272), vests power in the county court to grant administration upon the estates of all persons, whether they are residents or non-residents, and who leave property to be administered upon within the county. The word “property,” as used in the Code, and as defined therein, “includes personal and real property.” Section 26, clause 10. It is equivalent to the word “estate,” as used in relation to wills. It means every interest a man may have in any property, real or personal. The power of the executor, then, was complete over the subject matter. It does not alter the law as it previously stood. See Laws of Michigan, 308, sec. 8; Laws of Iowa of 1839, 503, sec. 94; Stat. of Iowa of 1843, 702, secs. 21, 22; and see *Bowles' Heirs v. Rome, adm'r*, 3 Gilman, 420. In this case, the old law expressly limited the power of administration to goods and chattels. In our law, it extends to the estate, or property. All the estate, real or personal, of the deceased, is subject to the payment of his debts. See Laws of Michigan, 309, secs. 8, 8 and 10; Laws of Iowa, 1839, 502–3; Stat. of Iowa, 1843, 722; *Ib.*, 702; Code of Iowa, sections 1341, 1353.

II. But it is said the appointment of executor not having been made until after five years after the death of decedent was known, it is not valid. In this case, the averment is, that Reynolds died in 1837, and that such death

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was generally known ; that administration was not taken out until May, 1855 ; and that therefore, more than five years having elapsed, the appointment was not valid under Code, section 1325. This involves the construction of statutes of limitation, and especially this section, which is only applicable to administration, and does not constitute a part of the general law of limitations in our Code. The following principles of law are applicable, and well settled :

1. Laws are always construed strictly to save a right, or avoid a penalty ; and liberally to give a remedy or affect an object declared in the law. 1 Bald. C. C., 316, cited in 1 Peters Digest, 420.

2. It is a general rule that a statute shall not be so construed as to give it a retrospect beyond its commencement. This is not only the doctrine of the common law, but a principle of general jurisprudence. 5 Hill, 334, and cases cited ; 1 Denio, 129 ; 3 Denio, 594.

3. So, no statute should have a retrospect beyond the period of its commencement, and should never be so construed as to divest acquired rights. 2 Gilman, 528 ; 11 Ill., 54 ; 10 Smedes & Marshall, 599 ; 14 Ill., 495 ; 1 G. Greene, 346 ; 2 G. Greene, 184, 244, 243.

4. The language of the United States Supreme Court is : "In construing statutes, there never should be allowed a retrospective operation, not required by express command, or by necessary and unavoidable implication. Without such command or implication, they speak and operate upon the future only. Especially should this rule of interpretation prevail, where the effect and operation of a law are designed, apart from the intrinsic merits of the rights of parties, to restrict the assertion of those rights. 15 Howard, 423 ; and see, to same point, 2 Carter, 486 ; 6 Cranch, 174 ; 2 Gallison C. C., 204.

5. The statute of limitations belongs entirely to the remedy, and does not affect, or form part of, the contract. 3 Johns., 267 ; 1 Carter, 56 ; Angell on Limitations, sec. 64 to 68, and cases cited ; 7 Indiana, 91 ; 8 Peters, 371 ;

cases, the whole learning on this subject is considered and exhausted.

6. The repeal of a statute of limitations, without some saving clause as to former rights accruing, but incomplete when such repeal takes place, places the parties as though no previous statute of limitations had ever existed. 1 G. Greene, 345; 1 McLean, 158; 1 Hill, 326, and cases cited. This case is remarkably clear and full.

7. The period of limitation does not begin to run until the grant of administration. There must be a person in existence capable of suing and being sued, before the statute of limitations can begin to run and operate upon the right. Angell on Limitations, sections 54–64; 1 Manning, 185–6; 5 Barb., 394, and cases cited; 11 Metcalf, 445.

8. On the death of the ancestor, the land held by him, descends to the heir, but it is held by him subject to the claims and rights of creditors. The heir cannot alien or incumber it in any way, to the prejudice of creditors. His is a defeasable title. 2 Greenleaf's Cruise, 142, note 1; 1 Hilliard on Mort., 210; 2 Hilliard Abridg. of Real Property, 578, sec. 28; 3 Mass., 523; 4 Mass., 354, 512, 150; 8 Ohio, 217; 3 Ohio State, 4, 494; 13 Ill., 171; 15 Ib., 156; 2 Peters, 658–9; 16 Ib., 62–8.

9. The purchaser under administrator's sale, enters under the ancestor, and not under the heir. The proceeding is one *in rem*, binding all parties. 15 Ohio, 435, 698; 3 Ohio State, 502–5; 11 Serg. & Rawle, 430; 2 Howard, 338.

10. The non-residence of intestate, and the presumed non-residence of all other parties concerned, prevented the time from running. Laws of Iowa, 1839, 327; Statute of Iowa, 1843, 386.

11. Let us look at the time within which administration was obtained under our previous laws. By Laws of Michigan, 312, twenty years were given; by Laws of Iowa, 1839, no time appears to have been specified, and of course the twenty years continued. By the statutes of Iowa, of 1843, 678, ten years are given. Now, by the

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13 Peters, 312; 9 Howard, 407. In these two last cited the laws of Michigan, the twenty years had not expired, when these letters were granted. In 1848, a new law limited the period to ten years, but in 1851 the Code was passed without any saving clause. The time had not then elapsed.

12. But the Code in 1851, limited the time to five years—within four years our letters are granted—therefore, we are in time, unless a retrospective effect is given to the law. The Code (section 1325), reads as follows:—“Administration shall not be originally granted after the lapse of five years from the death of the decedent, or from the time his death was known, in case he died out of the State.” And section 1508 reads as follows: “No person can question the validity of such sale after the lapse of five years from the time it was made.” In another case, applying this section, this court says: “We are not disposed to regard this last section of the Code as in the nature of a general statute of limitations, so as to apply to sales which had taken place prior to the passage of that statute; but should limit its application to causes arising under chapter 88 of the Code alone. But if it was to be regarded as an ordinary statute of limitation, then those principles would apply, which are settled in the cases of *Morris v. Slaughter*, 1 G. Greene, 338; *Forsyth v. Ripley*, 2 Ib., 181; *Hench v. Weatherford*, 2 Ib., 246; and *Gordon v. Mounts*, 2 Ib., 243. See *Cooper v. Sunderland*, 3 Iowa, 122. Now, in these cases, the analogy is complete, and the reasoning equally applicable to both sections. The sections 1671, 2 and 3, of the Code, are only applicable to chapter 99 of the Code, and have no relation to this provision under consideration. For the reasons above stated, we think the administrator was appointed in time, and upon no principle of law can the Code have a retrospective effect, unless expressly given.

WOODWARD, J.—This is an application under the one hundred and thirty-fourth section of the Code, for the al-

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lowance of an appeal from the county court. This section enacts, that if a party fails, without fault on his part, to claim or to perfect an appeal within the thirty days allowed by statute, he may apply to the district court, which, upon being satisfied of the above matter, and that the case requires revision, may authorize an appeal.

The only question is, whether a proper case is made for such an allowance. It is briefly the following: Otis Reynolds died in 1837, a non-resident of the State. No administration was taken out on his estate in this jurisdiction, until in May, 1855, the defendant applied for letters. The petitioners represent themselves to be his heirs at law, and others interested in his estate. They state that none of them had any notice of the intention of Miller to apply for letters; and that they had no knowledge of the grant of such letters, until the expiration of the thirty days allowed for appeal. The petitioners, therefore, pray the court to authorize an appeal, and show that there are questions of weight and importance connected with that of granting the letters, which should be heard: of this nature is the one whether administration could legally have been granted, and that, also, whether Miller was entitled to it.

These questions are somewhat fully discussed by counsel, but this is understood to be with a view of showing the necessity of a revision of the order of the county court; for the only question presented is whether the appeal should have been allowed. The respondent demurred to the petition, thus assuming the truth of the facts stated. In our opinion, the petition shows good ground for an appeal, as well as that the failure to take it in time, was without fault on the part of the petitioners. The fact that for eighteen years after the death of Reynolds, no administration was taken, presents serious questions for consideration; and the fact that the application was made after that length of time, without notice to the next of kin, and their want of knowledge of the application, and of the allowance of it, present an excuse for not taking an appeal within the thirty days prescribed. The appellants seem to

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have proceeded as soon as the facts came to their knowledge, for the present petition was filed within sixty days after the appointment of Miller.

The judgment of the district court is reversed, with directions to allow the appeal, and to hear the cause of the petitioners.

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The report of referees or arbitrators, is entitled to, at least, the same consideration as the verdict of a jury.

It requires something more than merely the opinion or conjecture of the party complaining, to overthrow the finding of referees or arbitrators.

If there is error or mistake in their finding, it must be made to appear.

In an action of right, the plaintiff, where he holds the legal title and right of possession to real estate, may recover for the use and occupation of the land, as well as the title and possession.

Under section 1238 of the Code, in relation to occupying claimants, a defendant in an action of right, can at any time, while in possession of the premises, file his petition to have the value of improvements made by him ascertained, and to obtain payment for the same, before surrendering the possession.

Where in an action of right, the parties, in writing, submitted the matters in controversy to arbitrators or referees, who were to examine the land and improvements thereon; take testimony, if desired, in order to determine the value of the improvements; to ascertain the annual value of the use and occupation of the land, from the time the plaintiff's title accrued, until the first of March, 1857; and to ascertain and report at the next term of the district court, all the necessary facts upon which the court was to predicate its judgment; and where on the coming in of the report of the arbitrators or referees, the defendant made an affidavit, that the referees had not allowed him the just and true value of his improvements; that they were worth double the value reported by the referees; and that he believes that said referees, in arriving at the amount fixed by them, had omitted to take into consideration a part of the improvements made upon the land by defendant, whereby great injury and injustice would be done him, unless the matters were again referred to them for consideration—upon which affidavit was based an application to the court, to refer the matter anew to the arbitrators or referees, for a full and perfect report, and with direction to strike out so much of the report as awards rents and profits of the land to the plaintiff, which motion was overruled, and

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judgment rendered on the report in favor of the plaintiff, for the title and possession of the land, and for the defendant, for the value of the improvements, as ascertained by the referees, after deducting the rents; *Held*, That the application was properly overruled.

Appeal from the Lee District Court.

WEDNESDAY, OCTOBER 18.

The original action was commenced in October, 1855, to recover of defendant the possession of the tract of land in controversy. In April, 1856, the parties desiring to settle the controversy amicably, agreed in writing to submit the same to arbitrators, who were to ascertain and report at the next term, all the necessary facts, upon which the district court was to predicate its judgment. They were to examine the land and improvements thereon, and were to take testimony, if they desired so to do, in order to determine the value of the improvements. They were also to ascertain the annual value of the use and occupation of the land, from the time the plaintiff's title accrued, until the first of March, 1857. At the next term of the court, it was agreed that judgment was to be rendered for the plaintiff, for the possession of the land; and that the court should allow the defendant payment for his improvements, according to the report of the referees, and the occupying claimant law of the State, after deducting the rents allowed by the same referees. The title of the land was admitted to be in the plaintiff, and that defendant's possession was by color of title. It was further agreed, that the defendant should remain in possession until March, 1857, at which time, possession was to be surrendered to the plaintiff, and the plaintiff was to pay defendant the value of his improvements reported by the referees, deducting the rents.

The arbitrators reported that, having first been duly sworn, they heard the testimony of the parties, and after being fully advised, they found the value of the improvements to be \$1,658; that the plaintiff's title to the land

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was acquired March 4th, 1854; that the defendant had, since that time, been in full possession, and that the annual value of the land was one dollar and fifty cents per acre, for seventy-five acres of cultivated land. They further report, that the defendant denied, that by the laws of the State, the plaintiff, in this action, could recover for rent; and the question of his right so to recover, is referred to the court.

On the coming in of the report, the defendant made affidavit, that the referees had not allowed him the just and true value of his improvements; that they were worth double the value reported by the referees; and that he believed that said referees, in arriving at the amount fixed by them, had omitted to take into consideration a part of the improvements made upon the land by defendant, whereby great injury and injustice would be done him, unless the matters be again referred to them for consideration. Based on this affidavit, the defendant made an application to the court, to refer the matter anew to the referees, for a full and perfect report, and with directions to strike out so much of the report as awards rents and profits of the land to the plaintiff. The district court overruled the motion, and rendered judgment in favor of the plaintiff, for the title and possession of the land; and in favor of the defendant against the plaintiff, for the value of the improvements ascertained by the referees, deducting the rents. The defendant appeals.

F. Semple, for the appellant.

Rankin, Miller & Enster, for the appellee.

STROXTON, J.—The statute provides, that upon a sufficient showing, the district court may set aside the report of referees, in whole or in part, and refer the matter anew, or any part thereof, either to the same, or other referees. Code, section 1796.

The only showing attempted to be made in this case, is

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by the affidavit of the defendant; and this, in our opinion, is wholly insufficient for the purpose of invalidating the report of the referees. It is not sufficient that the defendant states on his oath, that the improvements are worth twice the amount fixed as their value by the referees. This is the mere opinion of the defendant, upon a matter about which the plaintiff and himself differed; which difference the referees were to adjust by their decision. Nor is it sufficient that the defendant has sworn that he believes that the referees have omitted to consider a portion of the improvements in their estimate. If this is not mere conjecture on the part of the defendant, it must have been in his power to establish the fact, to the satisfaction of the court, by some evidence competent for the purpose. The affidavit of his belief by defendant, is not a sufficient basis for the action of the court. The referees state that they heard the evidence of both parties, and were fully advised concerning all the matters submitted to their decision. If there was any mistake, it must be shown by the defendant. It requires something more than merely his opinion or conjecture, to overthrow the finding of the referees. Their report is entitled to at least the same consideration as the verdict of a jury. Code, section 2111.

We think the plaintiff was properly allowed payment for the use and occupation of his land, from the time that his title accrued, to the time the defendant was, by agreement, to surrender the possession. The fact that the amount allowed for rents was deducted from the value of the improvements, is no valid objection to the judgment of the court. The submission executed by the parties, stipulates that the referees are to ascertain the value of the annual rents, and that the defendant is to be paid for his improvements, after deducting the amount of the rents as fixed by the report of the referees. As this was the agreement of the parties, there was no error in the judgment of the court which carried the same into effect.

At common law, the damages in ejectment were merely nominal. Adams on Ejectment, 289. If the plaintiff

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choose, however, to proceed for *mesne* profits, he may do so, giving notice of his intention. *Battin v. Bigelow*, 1 Peters, C. C., 452; *Brown v. Galloway*, 1 Ib., 291; *Rugan v. Phillips*, 4 Yeates, 382. The plaintiff, in his petition and notice, claims of defendant, as well the title and possession of the land sued for, as the sum of six hundred dollars, as his damages for the use and occupation of the premises, for a period not exceeding six years prior to the commencement of the action. Code, section 2008. We have no doubt but that the plaintiff, holding the legal title and right of possession to real estate, may as rightfully in this action, recover for the use and occupation as he may for the title and possession.

The remaining objection of the defendant is, that the district court rendered judgment for the plaintiff, without making payment for the improvements, a condition precedent to the issuing of execution. The plaintiff was entitled to judgment for the title and possession of the land. This judgment, the defendant could not resist, as he had nothing to oppose to the plaintiff's legal title. He now only claims the right to continue in possession, until his improvements are paid for. It must be borne in mind, that the judgment of court only settles the rights of the parties, according to their agreement, and the report of the referees. By this agreement, the defendant was to remain in possession of the land until March 1st, 1857, at which time the plaintiff was to pay him for his improvements, deducting the rents, and he was to surrender possession of the premises to plaintiff in good condition.

Under the occupying claimant law, (Code, section 1233), the defendant is entitled to remain in possession after judgment against him, until paid for improvements, on filing a petition to have their value ascertained, and to obtain payment for the same, before surrendering possession. This petition, we think, the defendant can at any time file, if he is apprehensive that he will be turned out of possession before the requisite payment is made. We think, however, he should not be driven to another action to effect this.

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The judgment of the district court will be so far amended, as to direct that no execution will issue on the judgment, to put the plaintiff in possession of the land, until the amount awarded to the defendant for the value of his improvements, (deducting the rents), shall be first paid or tendered to him. In other respects, the judgment will be affirmed.

Judgment affirmed.

CORRIELL v. BRONSON.

Where in an application for dower in two parcels of land, the court, by agreement of the parties, ordered that dower for both lots of land "be assigned out of one, (specifying it), but according to the value of the lots;" and where the referees assigned the whole of one lot, as the dower in both lots; and where the defendant excepted to the report of the referees, on the ground that the referees could not award two-thirds of one lot as the dower interest in the other lot; *Held*, That the defendant was concluded by his agreement from making the objection.

Where exceptions were taken to the report of referees appointed to assign dower, on the ground that the value of the claimant's dower should have been ascertained by reference to the value of the premises at the time of the alienation by the husband; and where there was nothing in the report of the referees to show, whether they valued the lots at the time of the alienation, at the time of the husband's death, or at the time of the assignment of dower; *Held* That it did not appear affirmatively that an improper value was adopted.

The word "value," in section 1294 of the Code, in relation to dower, was intended to provide for the assignment of dower according to the worth or value of the real estate, instead of the extent or quantity thereof.

Where a widow brings her suit to recover dower in two distinct parcels of land, and where the parties agree that it may be assigned entirely from one of the parcels, it is not necessary that the referees should state in their report the value of each, or either parcel of land.

Appeal from the Dubuque District Court.

WEDNESDAY, OCTOBER 13.

Petition for dower in lots 205 and 375, in the city of

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Dubuque. Petitioner was adjudged entitled to recover, and commissioners were appointed to assign the same. And it appearing that valuable improvements had been made on one of said lots, subsequent to the alienation thereof by the husband of petitioner, it was ordered that the commissioners make the assignment without including the said improvements. The parties agreeing thereto, it was ordered that "dower for both lots be assigned out of lot 375, (it not being improved), but according to the value of the lots." The commissioners thus appointed, made the following report: "We, the commissioners, have set off to Mrs. Charlotte Corriell, the whole of lot 375 in the city of Dubuque, Iowa, as her dower in lots 205 and 375, in said city, in pursuance of, and in accordance with, the said commission." This report was signed and sworn to by a majority of the commissioners, and duly filed. The petitioner moved to confirm the report, and the defendant filed his exceptions. The exceptions were overruled, the report confirmed, and judgment accordingly. Defendant appeals.

Burt, Barker & Pierce, for the appellant.

I. The statute requires the executor to set aside one-third in value of the real estate of which the husband died seized, during coverture, and in which the wife has not relinquished her rights, for the widow's dower. The appointment of referees, or commissioners, is only for the purpose of ascertaining the value, either in kind or money, as the circumstances of the case may require. The referees simply furnish a data for the court to base its instructions upon to the executor, in the performance of his duty under the statute.

II. The referees erred in setting aside the whole of lot 375, as dower in said lot, and in lot 205. The parties having stipulated that the whole dower should be allotted from lot 375, at most but two-thirds of that lot could be taken for the widow's dower.

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III. The dower should have been awarded according to the value of the real estate, at the time of alienation by the husband, excluding improvements made by the purchaser. The statute declares dower shall be as at common law. The rule at common law, and under a statute of similar phraseology to that of ours, is clearly established by the following authorities: *Humphreys v. Phinney*, 2 Johnson, 484; *Dorchester v. Coventry*, 11 Ib., 510; *Shaw v. White*, 13 Ib., 179; *Hale v. James*, 6 Johns. Ch., 258.

IV. The report of the referees should show value, quantity, and time when the property was valued—and whether the improvements were included or excluded—in order that the court can see that the law has been complied with.

S. P. Adams, for the appellee, cited *Powell v. Munson*, 3 Mason, 347; 4 Kent Com., 68; *Summers v. Bebb*, 13 Ill., 483.

WRIGHT, C. J.—The exceptions to the report of the commissioners, for convenience, may be considered under three heads. *First*: It is claimed that the commissioners should have reported the value of the widow's dower in the two lots, and in each lot. *Second*: That the value of the claimant's dower should have been ascertained, by reference to the value of the premises at the time of the alienation by the husband. *Third*: That they could not award two-thirds of lot 375, as the dower interest in lot 205.

We shall consider these objections in the inverse order of their statement.

It seems to us that the defendant is concluded from making the third objection, by his agreement made in open court, at the time the commissioners were appointed. It was then expressly agreed that her dower in both lots should be taken from 375. And this was to be ascertained by reference to the value of the lots, without considering the improvements upon lot 205. If, under this agreement,

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these commissioners concluded that lot 375 was only one-half as valuable as the other, we can see no reason why they should not give the whole of it to the claimant as her dower right in both lots. Thus, if one was worth \$300, and the other \$600, as they were by agreement to give her one-third of the aggregate amount, (\$900), from the lot of the least value, it would exhaust the whole of that lot. And we can only presume that the commissioners thus found. In the absence of any contrary showing, we can only suppose that these lots had this relative value; and that, therefore, the commissioners acted in strict accordance with their instructions and the agreement of the parties.

As to the second objection, we can only say, that if the position of the defendant be correct, there is nothing to show that the commissioners did not ascertain the dower of claimant, by reference to the value of the premises at the time of the sale by the husband. The record leaves us without any information upon this subject. Whether they valued the lots at the time of the alienation, at the time of the husband's death, or at the time of the assignment, we have no means of knowing. If the defendant desired to present this question, he should, by requiring the commissioners to report specifically upon this subject, or in some way, had the basis of their action, or the value taken by them, brought before the court. As the case stands, we cannot presume that they acted with reference to one time rather than another. We can, from this record, as well assume that they adopted the rule contended for by defendant, as that they adopted either of the other two. And therefore, without considering which would be the correct rule, we only determine that it does not affirmatively appear that an improper one was adopted.

The first objection, however, is the one mainly relied upon to reverse the case. And this we cannot think to be well taken. It is true, that the law provides that one-third in value, of all the real estate, shall be set apart to the widow. But the word "value," as here used, as we

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understand it, was intended to provide for the assignment of dower according to the worth or value of the real estate, instead of the extent or quantity thereof. But where, as in this case, the widow brings her suit to recover dower in two distinct parcels of land; and where the parties agree that it may be assigned entirely from one of the parcels, we can see no reason for requiring that the value of each, or either, should be returned. Such a return of value would not vitiate the report, but it certainly was not necessary. The agreement of the parties shows most conclusively, that her dower right in these lots was to be marked off by metes and bounds, if it should become necessary, but it was to be taken from one of the lots. If they contemplated that the value of her claim in these lots was to be reported, and afterwards her dower was to be set apart by the executor, then the agreement that the dower should be assigned out of one of the lots, it seems to us, would be without meaning or force.

But the law, we think, contemplates primarily, that the property itself shall be divided by the referees, but that if this cannot be readily done, then it may be sold, and she is to have the value of her dower in money, instead of in land. This is shown from several considerations, among which may be mentioned the following: Her dower is to be set apart, and so set off, as to include the ordinary dwelling house, and the land given by law to the husband as a homestead, or so much thereof, as may be equal to her dower, unless she prefers a different arrangement. This share may be set off by the mutual consent of all the parties interested, or by referees. The application is to be made for the admeasurement by the referees, by the widow, and they may employ a surveyor, and cause her share to be marked off by metes and bounds. If their report is confirmed, and not appealed from, she may bring suit to obtain the possession of the land thus set apart to her. See sections 1394-9 and 1402 of the Code. And when the extent of her dower is ascertained, either by the consent of the parties interested, or by the action and re-

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port of the referees, she is entitled to it—to the specific property—and not to its value out of the general estate, unless she voluntarily assents to such an arrangement. As before stated, the referees may, if they deem it proper, (and it perhaps would be advisable in every case), report the value of each tract of land, for in this method the correctness of these proceedings would be more readily shown. If they do not, however, we cannot think that their report should be set aside, unless it should be made to appear that they had given the widow more or less in value than her proper share. As already stated, this is not shown in this case.

It is proper to say, in conclusion, that we have considered the case, with reference to the provisions of the Code on the subject of dower, for the reason that the parties have so treated it, and doubtless properly, under the facts, all of which are not before us.

Judgment affirmed.

CRAWFORD v. BURTON.

Where there is any proper evidence before the jury, it is error to non-suit the plaintiff, on the motion of the defendant.

Where in an action of replevin, the plaintiff claimed the goods by virtue of a purchase from one G. C., and on the trial offered in evidence a bill of sale from the said G. C., acknowledged and recorded, but which acknowledgment was defective, which bill of sale was objected to, and ruled from the jury by the court; and where the plaintiff then called as a witness the said G. C., who testified that he sold the goods to plaintiff, receiving a considerable portion of the purchase money down, and plaintiff's note for the balance; that the plaintiff took possession, and he (the witness), left the store; that plaintiff owned the store-house in which the goods were kept, both before and since the sale; that afterwards the plaintiff employed the witness to sell the goods for him, under which agreement witness went into the store, and was so selling them when they were taken; and that he then notified the defendant, that he, (witness), had no interest in them, but that they were owned by the said plaintiff; and where the court at this stage of proceeding, on motion of the defendant, directed that the plaintiff be non-suited; *Held*, 1. That the court erred in excluding the

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bill of sale from the jury ; 2. That the court erred in rendering judgment of non-suit against the plaintiff.

Appeal from the Winneshiek District Court.

WEDNESDAY, OCTOBER 13.

At the June term, 1856, Burton obtained a judgment against George Crawford, upon which an execution was issued, and levied upon a stock of goods which had, at some previous time, belonged to the said George. The plaintiff claimed the goods, and replevied them in an action brought against J. S. Vanpelt, the sheriff. The name of G. W. Burton, as the claimant and real party in interest, was substituted as defendant.

Before proceeding to state the facts further, and the questions which arose, it is necessary to notice an incongruity which appears in the record, and which essentially affects the views to be taken of the case. The record entry of the judgment states that the jury returned a verdict in favor of the defendant. "Whereupon the court," says the record, "decided that the plaintiff be non-suited," &c.; while, on the other hand, a full and explicit bill of exceptions, setting out the proceedings upon the trial, and showing what evidence was offered and introduced by the plaintiff, and what was rejected, says : "After the introduction of the foregoing testimony, the counsel for defendant moved a non-suit of the plaintiff, which motion was sustained, and a non-suit directed, to which direction and ruling the plaintiff excepted." The assignment of errors, also, and the argument of counsel, regard the facts in the same light as the bill of exceptions—that is, that there was no verdict of the jury—as the appellant complains that the court took the cause from the jury, when there was some evidence before them upon which they might act. The plaintiff claimed the goods by virtue of a purchase from George Crawford, the defendant in execution, and on the trial offered in evidence a bill of sale, acknowledged

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and recorded, which was objected to, and ruled out by the court. This is assigned for error.

The plaintiff also called the said George as a witness, who testified that he sold the goods to the plaintiff, receiving a considerable portion of the purchase money down, and the plaintiff's note for the balance; that the plaintiff took possession, and he, (the witness), left the store; that plaintiff owned the store-house in which the goods were, both before and since the sale; that afterwards the plaintiff employed the witness to sell the goods for him, under which agreement witness went into the store, and was so selling them when they were taken; and that he then notified the defendant, that he (witness) had no interest in them, but that they were owned by the said John Crawford. It was at this point that the non-suit was ordered. The bill of exceptions also states, that "it is admitted that G. Crawford, as agent of the plaintiff, was in the store selling the goods, from the day of the sale to plaintiff until they were attached by the defendant."

William Tripp, for the appellant.

E. E. Cooley, for the appellee.

WOODWARD, J.—It is not within the limits of legal supposition, that the court should order a non-suit, after a verdict for the defendant; and therefore, considering the testimony of the bill of exceptions, and the other circumstances concurring with it, we incline to regard the entry relating to the verdict, as an error of the clerk, and will view the case accordingly.

It was erroneous to direct the non-suit. There was much for the jury to inquire into, although the bill of sale should be inadmissible. It does not appear why this instrument was rejected. It may have been because the justice does not certify of what county he is an official, as is indicated in plaintiff's argument; or it may have been because the

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certificate does not state that the vendor was personally known to him. It is defective in both these respects, if viewed with strictness. But this was not the end of the matter. It is true that the Code, (section 1193), enacts that a sale of personalty, when the vendor retains actual possession, shall not be valid against creditors, unless a written instrument conveying the same, be executed, acknowledged like conveyances of real estate, and filed for record; but two thoughts are suggested upon this point. In the first place, section 1193, has the qualification, "where the vendor retains the actual possession." There was evidence that he went out of possession, and this should have been left to the jury, under proper instructions, together with the fact of his going into the store again, in the employment of the plaintiff. In the next place, section 1211, relating to the recording of instruments affecting real estate, contains the exception of the case of notice to the third person. As the bill of sale is to be treated like a conveyance of real estate, in respect to the acknowledgment and recording, notice would, probably, in like manner, take the former out of the statute; and then the papers might be of effect, though not regularly acknowledged. And there was evidence tending to show such notice. *Miller v. Bryan*, 3 Iowa, 58. But farther, section 1193, relating to bills of sale, contains a like saving clause.

It would seem that the court proceeded upon the ground, that if the bill of sale was such that it was inadmissible as evidence, then there was no valid sale. But, as we have seen, a sale without a written instrument, would be good, if the vendor did not remain in actual possession; and also, the instrument of sale would be good, notwithstanding a defective acknowledgment, if the creditor had notice of the sale. And in either of these cases, the paper would be admissible as evidence of a sale.

The case should have been permitted to go to the jury upon the facts, the court instructing upon the law as they deemed right. If the trial by the jury proceeded until they returned a verdict, still there was error in rejecting

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the bill of sale wholly, when we take into view the evidence of notice to the creditor then attaching.

The judgment is reversed, and a procedendo awarded.

O'NEIL v. GARRETT.

The vendor's right of stoppage *in transitu*, continues until the goods have reached the buyer. When the transit is at an end, the delivery is complete, and the right of stoppage gone; but until the goods have reached their place of ultimate destination, as agreed upon by the buyer and seller, they are ordinarily liable to stoppage.

The right remains not only while the goods are in motion, and not only while they are in the hands of the carrier, but while they are in the hands of a warehouse-man, or place of deposit, connected with their transmission or delivery; or in any place not actually or constructively the place of the consignee, or not so in his possession or under his control, that the putting them there, implies the intention of delivery.

A delivery to a warehouseman, or wharfinger, at the place of the ultimate destination of the goods, who does not receive them as the mere agent of the buyer, but in the ordinary course of his business as a middle man, is not a constructive delivery to the purchaser, so as to put an end to the right of stoppage *in transitu*.

The vendor's right of stoppage *in transitu*, is not divested by the levy of an attachment against the purchaser of the goods, before they come into his possession. The vendor has the preference over the legal process of a general creditor, although but for the suit, the goods would have fallen into the hands of the vendee.

Where in an action of replevin by a vendor, to recover the possession of goods sold on credit, the vendee having become insolvent before delivery, against a sheriff, who claimed to hold the goods under attachments against the vendee, the plaintiffs asked the court to instruct the jury as follows: "That if O. & C., (warehouse-men), received the goods from the railroad company, in the usual course of their business as commission merchants, for storage, and not as the agents of H., (the vendee), and had no authority from H. to receive the goods, and were not the agents of H., then the right of stoppage *in transitu* was not determined, and plaintiff had a right to stop them by writ of replevin, provided the said H. became insolvent before the arrival of the goods, and after he purchased them," which instruction was re-

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fused; *Held*, That the court erred in refusing the instruction.

And where in such an action, the court instructed the jury as follows:

1. "That if the goods were delivered to O. & C., and were held by them subject to the order of H., and were attached by defendant in a suit against H., before plaintiff claimed and got possession of the goods, then the attaching creditors of H. will hold said goods as against the plaintiff in this suit;" *Held*, That the court erred in giving the instruction.

Appeal from the Des Moines District Court.

WEDNESDAY, OCTOBER 13.

This is an action of replevin to recover the possession of five barrels of ale, commenced before a justice of the peace, and appealed to the district court. The defendant claimed to hold the property as sheriff of Des Moines county under, and by virtue of, certain writs of attachment in his hands, against one Holmes.

On the trial of the cause before a jury, the plaintiff proved that one J. J. Holmes purchased the ale in controversy, of plaintiff, on credit; that Holmes became insolvent before the arrival of the ale at East Burlington, the terminus of the Chicago and Burlington railroad; that the ale arrived at East Burlington, Illinois, on the east bank of the Mississippi river, opposite Burlington, Iowa, by the Chicago and Burlington railroad, consigned to said Holmes, Burlington, Iowa; that it lay there unclaimed several days; that one Tedford, the agent of plaintiff, went to the freight agent of the said railroad, and told him said Holmes had become insolvent, and to retain the ale for plaintiff; that said agent, finding that attachments were about to be issued against said Holmes, to save litigation to the railroad company, sent the ale over to Ogden & Copp, commission merchants at Burlington, Iowa, who received it, and paid the charges; that Ogden & Copp had no authority from Holmes to receive his goods, nor did said Holmes know that they were in the possession of said Ogden & Copp; that said Ogden & Copp received

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the ale as they did other goods, for Burlington and other places west, subject to Holmes' order, but without any instructions from him, and so held them at the time they were replevied. It also appeared from the testimony of Tedford, the agent of the plaintiff, that he was, at the date of the replevin of the ale, and for some time previous had been, acting as plaintiff's agent, in posting him as to the credit and responsibility of his customers in Burlington, and in stopping goods which arrived after the debtor failed; that in this case, he had written special authority by letter to stop the ale; that at the time he spoke to the agent of the company, at East Burlington, he told the agent to hold the goods until he could write to Chicago, for written authority to take possession of the ale; and that he did not get the written authority to replevy the ale, until after it had been stored in the warehouse, in the city of Burlington, Iowa, and after it had been attached.

The defendant then introduced evidence to prove the value of the ale, and that it was attached by him while in the possession of Ogden & Copp, before the replevin, under writs of attachments against said Holmes; and that he did not remove the ale, but took Ogden & Copp's receipt therefor, and left it with them.

The plaintiff asked the court to instruct the jury as follows: "That if Ogden & Copp received the goods from the railroad company, in the usual course of their business as commission merchants, for storage, and not as the agents of Holmes, and had no authority from Holmes to receive the goods, and were not the agents of Holmes, then the right of stoppage *in transitu* was not determined, and plaintiff had a right to stop them by writ of replevin, provided the said Holmes became insolvent before the arrival of the ale, and after he purchased it"—which instruction the court refused to give. At the request of the defendant, the court then instructed the jury as follows:

I. That if the ale was delivered to Ogden & Copp, and was held by them subject to Holmes' order, and was at-

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tached by defendant, in a suit against Holmes, before plaintiff claimed and got possession of it, then the attaching creditors of said Holmes, will hold said ale as against the plaintiff in this suit.

II. That if the ale had reached its place of destination, and was attached before the vendor had asserted his claim, or right to take possession of the same, then the defendant will be entitled to recover in this suit.

The plaintiff excepted to the refusal of the court to give the instruction asked for by him, and also to the giving of those requested by the defendant. A verdict having been returned for the defendant, and judgment rendered thereon, the plaintiff appeals, and assigns for error, the refusing to give the instruction requested by him, and in giving those asked by the defendant.

Starr, Phelps & Robertson, for the appellant.

The sole question is, was the right of stoppage *in transitu* determined? We understand the law to be, that the right is determined only by a delivery to the consignee, or his general or special agent. Chitty on Contracts, (8th American Edition), 378; Story on Con., 820, 1, 2. Where the consignor has designated a certain consignee, to whom he wishes the goods delivered, the right is gone, upon delivery to that person. But there was no such direction in this case.

Again: Ogden & Copp merely received the ale as agents of the railroad company, and there was no privity between them and Holmes, nor could the railroad company, after notice, deprive the plaintiff of his right of stoppage, by delivering them even to Holmes himself. Chitty on Cont., 381, where the author says: "It is not necessary in order to the proper exercise of the right of stoppage *in transitu*, that the consignor should obtain actual possession of the goods; but it is sufficient, if he give notice of his claim to the person in whose custody they are during the transit; and if such notice be given whilst the goods are

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in transitu, a subsequent delivery thereof to the consignee, by the carrier or wharfinger, will not entitle even the assignees of the consignee to hold them." See, also, 2 Espinasse Rep., 613; *Northey et al. v. Fields*, 2 Espinasse, 613; *Mills et al. v. Ball*, 2 Bosanquet & Pullen, 457. These two cases are directly in point. *Buckley v. Furniss & Stickney*, 17 Wend., 505; 15 Ib., 137; 1 Parsons on Conts., 482. The ale had, in no sense, come into the possession of the vendee.

The attachment did not divest plaintiff of his right of stoppage. 17 Wend., 505.

Browning & Tracy, for the appellee. [No brief of the counsel for the appellee was found upon the files.]

STOCKTON, J.—The vendor's right of stoppage *in transitu* continues until the goods have reached the buyer. When the transit is at an end, the delivery is complete, and the right of stoppage gone. But until the goods have reached their place of ultimate destination, as agreed upon by the buyer and seller, they are ordinarily liable to stoppage. The right remains, not only while the goods are in motion, and not only while they are in the hands of the carrier, but also while they are in the hands of a ware-houseman, or place of deposit connected with their transmission or delivery. *Covell v. Hitchcock*, 23 Wend., 611. Or in any place not actually or constructively the place of the consignee, or not so in his possession or under his control, that the putting them there implies the intention of delivery.

A delivery to a ware-houseman or wharfinger, at the place of the ultimate destination of the goods, who does not receive them as the mere agent of the buyer, but in the ordinary course of his business as a middle-man, is not a constructive delivery to the purchaser, so as to put an end to the right of stoppage *in transitu*. *Edwards v. Brewer*, 3 Meason & W., 375. So, where the goods had been delivered to an agent of the buyer, who delivered them to a forwarding house for shipment, and they came

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to the hands of other forwarders; yet the right of stoppage was held to continue. *Hays v. Monille*, 2 Harrison, 48.

The only question in this case is, whether the delivery of the goods by the railroad company to Ogden & Copp, was a constructive delivery to Holmes, the buyer and consignee. We do not think that it was. The plaintiff had notified the railroad company that Holmes was insolvent, and of their claim to stop the goods, whilst they were upon the east bank of the Mississippi river, and before they had been placed in the possession of Ogden & Copp. Ogden & Copp were warehousemen, who received the goods as they did other persons' goods, from the company for forwarding, paying the freight and charges upon them, and holding them subject to Holmes' order. They had no authority from Holmes to receive the goods; they had never been his agents, or received goods for him before; Holmes did not know the goods were in their possession.

Under these circumstances, it seems to us, that Ogden & Copp were the agents neither of the plaintiff nor of Holmes; and neither for the custody nor for the transmission of the goods. The railroad company having been notified of plaintiff's claim to stop the goods on account of the insolvency of Holmes, and having in consequence placed them in the possession of Ogden & Copp, as warehousemen, the latter held them for the railroad company, and their possession was the possession of the company, who had no right to part with the goods after the notice from Holmes, except to deliver them to him. There is nothing in the evidence from which it can be implied, that the delivery to Ogden & Copp was an intended delivery to Holmes. They were subject to the order of Holmes in the possession of Ogden & Copp, only in the same sense that they were subject to his order in the hands of the carrier. The company could not defeat the right of stoppage, by delivering the goods to a warehouseman, not the agent

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of the buyer. It was not a constructive delivery to Holmes.

As to the effect of the levy upon the goods by the defendant, Garrett, as sheriff, by virtue of an attachment at the suit of a creditor of Holmes, there can be no doubt but that the plaintiff's right as vendor is not divested by the levy before the goods came into the possession of the buyer. The plaintiff has the preference over the legal process of a general creditor, although, but for the suit, they would have fallen into the hands of the vendee, Holmes. *Correll v. Hitchcock, supra*; *Buckley v. Furness*, 15 Wend., 137.; *Ib.*, 144; *Naylor v. Dennie*, 8 Pick., 198; 17 Wend., 505; *Sawyer v. Joslin*, 20 Vermont, 172; *House v. Judson*, 4 Dana, 11; *Cox v. Burns & Rentgen*, 1 Iowa, 64.

The district court erred in refusing to give the instruction to the jury, asked by the plaintiff, and in giving the first instruction asked by the defendant. There was error also in the second instruction asked by the defendant and given by the court, in awarding a preference to the attaching creditor, who seized the goods in the possession of the warehousemen, over the vendor, who asserts his rights of stoppage before they reached the buyer. The goods, in this instance, had not reach their destination, by being placed in the possession of Ogden & Copp, who were in no sense the agents of Holmes. *Cox v. Burns & Rentgen*, 1 Iowa, 64.

The judgment will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

ANDERSON v. AMES & Co.

Where on the trial of a cause, the plaintiff produced a small book, containing the account on which suit was brought, in which were charges against the defendants and other persons, which account, among other things, charged the defendants with a certain quantity of stone; and

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where the plaintiff testified that the charges in said book against the defendants, were not made at or near the time of the transaction, for the reason that he was not present when the defendants were getting the stone; that the defendants told him, after they had finished getting the stone, the amount, which he then entered as appeared in said book; that this was his book of original entries; and that the charges therein made were true; and where the defendants objected to the introduction of the book in evidence: 1. Because the same was not a book of accounts within the meaning of the Code; and 2. Because the entries were not proper evidence, on account of the manner of making them, which objections were overruled, and the book admitted in evidence; *Held*, 1. That the book, so far as it related to the stone, was properly admitted in evidence; 2. That as to the other items of the account, the book should have been rejected; 3. That the showing of the plaintiff brought the book within the reason and spirit of the statute.

A bill of exceptions which embraces all the rulings and decisions of the court on the trial, complained of, and shows that the exceptions were taken in fact at the proper time, is unobjectionable. It is not necessary that each ruling complained of should be the subject of a separate bill of exceptions.

Appeal from the Monroe District Court.

WEDNESDAY, OCTOBER 13.

On the trial of this cause, the plaintiff, to sustain his action, produced a small book, containing charges against the defendants and other persons, which contained the following account:

EDWIN AMES & Co., Albia, Iowa,		Dr.
To CHAS. W. ANDERSON.		
July 28, 1853,	to 7 perch stone, at 75c. per perch,..	\$5 25
	to 1 keg blasting powder,.....	6 50
Oct.	to 200 perch stone, 25c. per perch,..	50 00
	to 11 stone wedges,.....	1 20
	to 1 coal pick,.....	1 50
	to 1 stone hammer,.....	3 00
		<hr/>
		\$67 45

The plaintiff was then sworn, and stated that the charges in said book were not made at or near the time of the transaction, for the reason that he was not present when

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the defendants were getting the stone; but that afterwards in the month of October, 1855, defendants told him, after they had finished getting them, the amount, which he then entered, as appears in said book. He also stated that this was his book of original entries, and that the charges therein made were true. To the introduction of this book as evidence, the defendants objected: 1. Because the same was not a book of accounts within the meaning of the Code; and 2. Because the entries were not proper evidence, on account of the manner of making the same. These objections were overruled, and the book admitted. Judgment for plaintiff. Motion in arrest and for a new trial, made and overruled. Defendants appeal.

T. B. Perry and Cassady & Crocker, for the appellants.

Kelsey & Kelsey, for the appellee.

WRIGHT, C. J.—The Code, (section 2406), provides that it must be shown by the party's own oath, or otherwise, that the charges made in his book of original entries, were made at or near the time of the transactions therein entered, unless satisfactory reasons appear for not making such proof. In this case, the plaintiff stated that the charges were not made at or near the time of the transaction, and the reason given is, that he was not present at the time the stone was taken by defendants, but that afterwards, in the month of October, 1855, and after they finished the work, they told him of the amount, which he then entered as appears in the book.

So far as the book relates to the stone, we think it was properly received. The reason given, seems to us satisfactory. It was for the court to judge of the competency of the evidence offered, and the province of the jury to determine the credibility or weight to be given to the book when before them. *Coxwell v. Dollivir*, 2 Mass., 217; *Elder v. Warfield* 7 Harr. & Johns., 391. *Prima facie*, it would seem that the entry was made at or about the

Turner v. Maddox.

time he first had knowledge of what charge he should make—or to what extent the defendants were debtors. The spirit and reason of the law, we think, was complied with.

As to the other items, we think the book should have been rejected. It will be observed that defendants are charged with powder, wedges, pick, and hammer. As to these, as well as the stone, the plaintiff stated that the charges were not made at or near the time of the transaction; but the reasons given for not making such entries apply alone to the items for stone. There is nothing to show why the other items were not entered at the proper time. Without some satisfactory reasons, applicable as well to the items for powder, &c., as to those for stone, the book, as to such items, should have been rejected.

The appellee suggests that the bill of exceptions is not signed by the judge. In taking this position, he misapprehends the record. The bill of exceptions incorporates what purports to be the greater part of the evidence, the motions for a new trial, and the affidavits in support of the same, and is then signed by the judge. Instead of taking several bills of exceptions, the second exceptions taken were all embodied in one. To this practice there is no conceivable objection. And particularly where, as in this case, it appears that exceptions were taken in fact to the several rulings and decisions, at the proper time.

Judgment reversed.

TURNER v. MADDOX.

An application for a change of venue, on the ground that the defendant resides in a different county from that in which the suit is brought, is not an *ex parte* question.

Where there is application for a change of venue, for the reason that the suit is brought in a different county from that in which the defendant resides, the plaintiff should be heard upon the question of residence, and permitted to show that he has commenced his action in the proper county.

Turner v. Maddox.

Appeal from the Guthrie District Court.

WEDNESDAY, OCTOBER 13.

Appeal from an order of the district court, directing a change of venue. The defendant being sued in Guthrie county, he made affidavit that he resided in Mahaska, and not in Guthrie county. The plaintiff offered a counter affidavit, that defendant did not reside in Mahaska, but in Guthrie, and offered further to prove the same. The court refused to hear the evidence offered by the plaintiff, and ordered the change, with ten dollars cost to the defendant, from which the plaintiff appeals.

Bates & Phillips, for the appellant.

No appearance for the appellee.

WOODWARD, J.—That the plaintiff should be heard upon the question of residence, and be permitted to show that he has commenced his action in the proper county, we think manifest. It is not an *ex parte* question. The proper manner of presenting evidence on a motion, is by affidavits, but it would be discretionary with the court to receive it orally. It does not appear, however, in what manner evidence was offered, farther than the affidavit of plaintiff, and the manner of adducing it is not made the question. The main point is, whether the court should have heard the plaintiff, and we are of the opinion that it should, and that in not doing so, there was error. As to the amount allowed, there are no facts before this court upon which to adjudicate; and if we assume that there were none before the district court, still we should not be disposed to disturb the order.

The judgment for a change of venue is reversed, and the district court is directed to proceed in accordance with this opinion.

Messenger v. Marsh et al.

MESSENGER v. MARSH *et al.*

Section 1827 of the Code does not apply to all cases in which a judgment by default may have been entered.

The requisitions of section 1827 are to be complied with, where the judgment has been regularly taken, and where the party is really in default.

In case of judgment by default, entered by mistake, or without notice to the party, or rule upon him to answer, the statute does not require an affidavit of merits in order to set aside a default.

In any case, where it is apparent that a judgment by default has been hastily and improvidently rendered, and where the facts are within the knowledge of the court, the default may be set aside, without an affidavit of merits.

Appeal from the Lee District Court.

WEDNESDAY, OCTOBER 13.

In May, 1841, a decree was made for the partition of the Half-Breed Tract, in Lee county, among the several claimants. In August, 1845, Henry De Louis, and Elizabeth, his wife, and John Wright, filed their bill of complaint in chancery, in the district court of Lee county, alleging that said decree was obtained, and procured to be rendered, by collusion and fraud, and asking that the said decree of partition be vacated and annulled, and to have the said Half-Breed tract re-partitioned among the rightful owners according to their respective shares. To this bill, William Meek and ninety-three other persons, represented as having a beneficial interest under said decree of partition, as parties thereto, and as claiming an interest in said tract of land, were made parties defendant. Of these defendants, Benjamin F. Messenger and seventeen others, at the March term, 1850, by their cross-bill, against the parties to the original bill as defendants, admitting all the facts alleged in said original bill, and all the equities therein set forth, prayed the court for the same relief sought by the original complainants, viz: that the said decree of partition be set aside, and that the said Half-Breed Tract

6	491
121	618
122	14

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be re-partitioned among the rightful owners. They likewise prayed and obtained writs of injunction, against judgments obtained against them upon titles derived from said decree of partition. The suit upon the said cross-bill was docketed as *Benjamin F. Messenger v. William Meek and others*.

At the April term, 1850, there was a rule upon the defendants to the cross-bill served with process, to plead, answer or demur thereto, by the first day of the next term. At the next December term, there being no answer on file, the complainants claimed a judgment by default, for want of an answer, against the defendants served with process. No judgment, however, seems to have been rendered; and at the same term the complainants in the cross-bill, applied for and obtained an order changing the venue of the cause to Muscatine county. The record, however, contains no transcript of the proceedings had in the cause in the district court of that county. The next that is heard of the cause, it is in this court, where at the December term, 1851, the judgment of the district court upon a demurrer to the original bill, was affirmed. On the 6th of December, 1854, on motion of the attorney for Messenger, an order was made in this court, remanding the cause to the district court of Lee county, for such proceedings in said court, as might be proper upon the cross-bill of said Messenger and others. The clerk of this court was, at the same time, directed to retain in his office the original papers filed in this court, and to send certified copies only to the said district court. A writ of *procedendo* was not issued in the cause, until another order was made to that effect, by this court, on the motion of Messenger, at the December term, 1856. The writ was issued by the clerk of this court, December 13, 1856. It was issued in the original suit of *Wright and De Louis v. William Meek and others*.

It appears, however, that at the April term of the district court of Lee county, 1856, the cross-bill was placed upon the docket of said court, under the title of *B. F.*

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Messenger v. Marsh, Lee & Delavan, and was ordered to be continued generally until the next term. At the October term, an order was made to the effect, that "the defendants having failed to answer, a default is entered against them." At the same term, a motion was made to set aside the judgment by default, and the motion was continued until the next term; at which term, the motion was sustained, and the judgment by default set aside. From the order setting aside this judgment, the complainants have appealed to this court.

F. Semple and Geo. R. Todd, for the appellants.

C. Mason, for the appellees.

STOCKTON, J.—The above constitutes the history of this cause, as we have been enabled to gather it from the record. This record, it will at once be seen, is incomplete, as it contains no part of the proceedings in the cause from the April term, 1850, to the October term, 1856. The history, state, and condition of the cause, in the meantime, we are not informed of.

We see no sufficient reason for interfering with the discretion exercised by the district court, in setting aside the judgment by default. The statute provides that "judgments by default may not be set aside, unless an affidavit of merits be filed, and a reasonable excuse be shown for having made such default." Code, section 1827. We do not understand this provision of the statute, as applying to all cases in which a judgment by default may have been entered. Its requisitions are certainly to be complied with, where the judgment has been regularly taken, and where the party is really in default. But in case of judgment entered by mistake, or without notice to the party, or rule upon him to answer, we do not understand the statute as requiring an affidavit of merits. Nor, in any cause, when it is apparent that the judgment has been hastily or improvidently rendered. These things may be

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within the knowledge of the court, and require no affidavit to make the facts more apparent. The record is under the control of the court, and may be amended, or any entry expunged, at any time during the term. Code, section 1579. Otherwise, a party would be required to bring his cause to the supreme court, to have set aside a judgment entered by oversight or mistake.

We will examine briefly, the state of the cause at the time the judgment by default was rendered.

I. The original suit of *De Louis and Wright v. Wm. Meek and others*, was disposed of in this court at the December term, 1851. At the December term, 1854, the defendant Messenger, one of the complainants in the cross-bill, obtained an order from this court, remanding the cause to the district court of Lee county, for such further proceedings on the cross-bill as might be proper. No writ of *procedendo*, however, issued until December, 1856. Previously to this time, to-wit: at the April term, 1856, the cause had been placed on the docket of the Lee district court, and at the October term, six weeks before the writ of *procedendo* was issued, the said district court had taken jurisdiction of the cause, and this judgment by default had been entered. Under the circumstances, we do not see but that this action of the district court was premature; and that the defendants in the cross-bill, might well object to the judgment by default until the writ of *procedendo* was filed.

II. By the Code, (section 1824), it is provided that "if defendant fail to file his answer by the time prescribed, judgment by default may, on motion, be entered against him." By the statute in force when this suit was instituted, it is provided, that "the court may by rules establish the times within which the answer shall be filed; and if the defendant shall not file his answer within the time limited, the court may render a decree, or order the complainant to prove the allegations of his bill, and such decree may then be made as the court shall think fit." Act of January 23, 1839, sections 12, 13; Rev. Stat., 108. Ex-

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cept the order made at the April term, 1850, for the defendants served with process, to plead, answer, or demur to the cross-bill, by the first day of the next succeeding term, there was no rule upon the defendants in this case to answer, nor any time prescribed within which their answer should be filed. This order to the defendants to answer to the cross bill was premature. The statute in force at the time, provided that "if a cross-petition be filed by any defendant, he must put in his answer to the first petition, before the defendants to the cross-petition shall be compelled to answer." Section 24, Rev. Stat., 109. It does not appear from the record, that at the time this order was made, the defendants, who were complainants in the cross-petition, had filed their answer to the original bill.

The defendants were entitled to some notice, that the cause was again upon the docket, or to a rule upon them to answer the petition. Nothing of this kind is shown. Estis, the agent of the defendants most interested in defending the suit, states in his affidavit, that no notice of the fact that the cause was again on the docket, was given to him, or to defendants, or to any one representing their interests. When we consider that the cause had been for five years off the docket, after the same had been decided in the supreme court, without any attempt to re-instate it, the defendants were justified in supposing that the complainants had abandoned their suit. When it again makes its appearance on the docket, no explanation is given of the manner in which it gets there. It is without any writ of *procedendo* from the supreme court, and no such writ is produced or filed, until six weeks after this judgment by default had been rendered.

It is further to be considered, that the cause had originally been on the docket of the district court, under the name of *Messenger v. Meek & others*. When it comes back from the supreme court, it appears under the name of *Messenger v. Marsh, Lee and Delavan*, as if another suit. It is easy to see how readily the defendants might

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have been misled into the supposition that it was not the same suit, but some other, in which they had not been served with process. We think the district court was fully justified in setting aside the judgment by default.

Judgment affirmed.

THE STATE OF IOWA, *ex rel.* THE ATTORNEY GENERAL v.
TILGHMAN *et al.*

An affidavit for a continuance, on account of the absence of witnesses, or for the reason that there had not been sufficient time to take their depositions, which does not state the names and residences of such witnesses, nor what facts the affiant expects to prove by them, or show some excuse therefor, is fatally defective.

Where the defendants in an action, filed a motion that W. be required to show his authority for appearing as attorney for complainant, which motion was supported by an affidavit of one of the defendants, stating that he had employed the said W. as an attorney in the defence of said cause; and that he had undertaken to act in that capacity, representing that he had no engagement to conflict with such undertaking; and where the said W. filed an affidavit, stating that in October previous, one of the defendants had expressed a desire to retain him; that he was then in no manner employed in the cause; that he was then willing to be engaged on the part of the defendants; that afterwards another of said defendants informed him that this retainer was without authority, and it was their (defendants') wish, that he should retire from the cause; that he had no professional consultation with any one in making up the pleadings; that he never received any fee from the defendants, and considered himself entirely discharged; that in February or March after this, he was employed by the attorneys of record for complainant, to appear for them; and that he had their written authority to that effect; and where the court sustained the motion, and required the said W. to show his authority to appear; *Held*, That there was no error in the proceeding.

In chancery, the answer of the respondent, upon any matter stated in the bill, and responsive to it, is evidence in his favor; and is conclusively so, unless it is overcome by evidence which is equal to the satisfactory evidence of two witnesses.

Where the answer of the respondents to a bill in chancery, is responsive to the matters stated in the bill, and there is no proof to overcome the answer, it is to be taken as true, although a general replication may have been filed.

The State of Iowa, ex rel. The Attorney General v. Tilghman et al.

Whether a decree in equity dismissing the complainant's bill, will bar the filing of another bill, *quære?*

Appeal from the Webster District Court.

WEDNESDAY, OCTOBER 13.

In August, 1855, Francis W. Allen departed this life. In September following, three of the defendants were appointed administrators of his estate. One of them, (Thrift), resigned, and in January following, the others, under an order of the proper county court, sold two hundred acres of land, of which Allen died seized, to Butterworth, and said Thrift.

This bill was filed in the name of the attorney general, in July, 1856, and sets out in substance, that Allen died, leaving no heirs; that he was not in debt; that he was, at the time, a resident of Nebraska territory; that his entire estate escheated to the State; that the proceedings on the part of respondents, in procuring the appointment of administrators, and the sale of said land, were fraudulent and void; that respondents combined together, for the purpose of cheating and defrauding the State; and that they well knew that there were no debts, and procured the sale of the land for much below its actual value.

The answer denies, generally and specifically, any and all fraud wherewith defendants are charged in said bill; denies that Allen departed this life in Nebraska territory; but states that he was a resident of the State of Iowa. The defendants also aver that said Allen had heirs, and that he was indebted; that some three thousand dollars of debts were proved up before the county court, before the order was made for the sale of the said land; and admit that Thrift and Butterworth were the purchasers, but insist that they paid the full value of the same. To this answer, there was a general replication. On the hearing, the bill was dismissed, and complainant appeals. For the other material facts, see the opinion of the court.

The State of Iowa, ex rel. The Attorney General v. Tilghman et al. .

Samuel A. Rice, Att'y General, and *J. C. & B. J. Hall*,
for the appellant.

Finch & Crocker, and *J. M. Ellwood*, for the appellees.

WRIGHT, C. J.—Complainant moved for a continuance, which motion was overruled, and this is the first question presented for our consideration. At the October term, 1856, the cause being at issue, was continued to the next term, and set down for hearing upon depositions. The law then fixed the next term in October, 1857, but on the 28th of January, 1857, the legislature passed an act, fixing the terms thereafter, in March and September of each year. The motion to continue was made at the March term, 1857, and sets up this change in the law, and the inability of the complainant, for that reason, as well as others, to prepare the case for hearing.

Without examining the affidavit upon which the motion is based, in all its parts, it is sufficient to say, that in two respects, at least, it was fatally defective. It does not contain the name of any witness, nor does it state their residence, nor what complainant expects to prove by them. Continuances may be allowed for any cause which satisfies the court that substantial justice will thereby be more nearly attained. Code, section 1765. Where the application is made, however, on account of the absence of witnesses, or, as in this case, upon the ground that depositions have not been taken, and the cause thus prepared for trial, the affidavit ought to give the names of the witnesses—their residence—and the particular facts which affiant expects to prove, or give some sufficient excuse for not doing so. The object in continuing a cause, is that in the language of the Code, substantial justice may be more nearly attained. And this should be made to appear, otherwise there is no necessity for continuing the cause upon the docket. Not only so, but the opposite party has a right to know the facts expected to be proved, for it might be ad-

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mitted that the witnesses would swear to the facts stated, and thus all necessity for a continuance would be avoided. Sections 1766-7. In this case, we are of the opinion, that sufficient is shown to justify the failure on the part of complainant to take depositions, but in the other respects stated, the affidavit is substantially defective.

It is next assigned for error, that the court erred in refusing to allow James W. Woods, Esq., to appear and prosecute for the complainant. The circumstances, as shown by the record, were as follows: One of the defendants filed his affidavit, that he had employed the said Woods as an attorney in the defence of said cause, and that he had undertaken to act in that capacity, representing that he had no engagement to conflict with such undertaking. Thereupon, defendants moved that said Woods be required to show his authority for appearing for complainant. This was on the 28th of April, 1857; and on the same day, Woods filed his affidavit, stating that in October previous, one of the defendants had expressed a desire to retain him; that he was then in no manner employed in the cause, and was willing to be engaged on the part of respondents; that afterwards, another of said respondents informed him, that this retainer was without authority, and that it was their (respondents') wish, that he should retire from the cause; that he had no professional consultation with any one, in making up the pleadings; that he never received any fee from respondents, and considered himself entirely discharged; and that in February or March after this, he was employed by the attorneys of record for complainant, to appear for them, and had their written authority to that effect. On the same day, it appears that the application for a continuance was overruled, and the motion that Woods be required to show his authority, sustained. On the next day, the cause was submitted to the court, but no appearance was made for complainant.

Appellant now assumes that the court refused to allow Woods to appear and prosecute said cause. We do not so understand the record. The order is, that he be required

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to produce his authority, and not to stay any proceedings by him on behalf of the party for whom he assumed to appear. And yet, the latter would have been the order, if the court went to the extent now claimed. Code, section 1617. The court had the power to require him to produce, or prove his authority. If it be said that the attorney did prove it by his own oath, and that this is sufficient under section 1617, this is answered by the suggestion, that his affidavit states that he had written authority to appear. It was therefore perfectly competent for the court to require him to produce this authority, or show cause why he did not. And this, we understand to be the meaning of the order made, and not that his right to appear was denied, after the production of his authority. It is not shown that he ever produced the authority to which he referred. On the contrary, on the next day, there was no appearance for complainant, nor is it shown that Woods afterwards claimed that he had a right to appear. It may be suggested by counsel, that the record does not speak the truth in this respect. However this may be, we must take it as verity, and decide accordingly.

It is next assigned that the court erred in rendering the decree on the petition and answer, without reference to the replication. The general practice in this country is, to treat a cause in chancery, as fully at issue upon the filing of the replication. A subpoena to rejoin—an order to contest the *litis contestatio*—as practised under the old civil law, is not necessary. The replication, under our practice, is usually general, and is a denial of the truth of the answer—puts in issue the sufficiency of the matter alleged therein, to bar the complainant's suit—and amounts to an assertion of the truth and sufficiency of the bill. The answer of the respondent, however, in every case, upon any matter stated in the bill and responsive to it, is evidence in his favor; and is conclusively so, unless it is overcome by evidence which is equal to the satisfactory testimony of two opposing witnesses. Story's Eq. Plead., sections 878, 9, and note 5; 2 Story's Eq. Jur., sec. 1528; *Davis v. Ste-*

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vens, 3 Iowa, 158; *Smith v. Brush*, 1 Johns. Ch., 459. In this case, there was no proof made by either—the answer of defendants was responsive to the matter stated in the bill—and if there was no proof to overcome it, it was to be taken as true. In this respect, it could make no difference that a general replication was filed.

But it is said that the cause was determined without reference to the exhibits referred to in the pleadings. If these exhibits were so referred to as to make them a part of the pleadings, then they were considered; for the record states that the cause was heard upon the petition and answer—no other evidence being introduced. That is to say, if the record relied upon, was a part of the papers and pleadings in the case—was so far, by the form of the pleadings, incorporated into them, as to bring it before the court—then it must have been considered. If this record was not thus incorporated, then the inquiry is, whether the court could, without its production, consider it. Suppose that it could be considered, then the question arises, should the decree have been different? We think not, and for one controlling reason.

This bill is filed on behalf of the State, claiming the property as an escheat. The State can only claim it upon the ground, that the decedent left no heirs, and then only such as may be left after the payment of debts. Code, sections 1408–14. In this case, the bill states that the property was uninherited, and that the deceased left no debts. Both of these averments are expressly denied in the answer. Unless, therefore, there was something in the exhibits referred to, to overcome this express denial, it necessarily follows that the State would have no right to the property, and could not maintain this bill. The record relied upon, is the proceedings before the county court. This has been certified to this court, but appellees object that it has nothing to do with the case, and is improperly here. Without passing upon this question, we need only say, that after examining it most carefully, we find nothing to contradict or destroy the effect of the posi-

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tive denials contained in the answer. As to the existence of heirs, the record is silent. It is shown, however, that there were debts. Assuming, therefore, that the court below did not consider this record—and that there was error in this—it would still follow, that the decree below, so far as this objection is concerned, must be affirmed.

It is finally insisted that the bill should have been dismissed, without prejudice to the right of complainant to file a new bill. An examination of the record satisfies us, that there are strong apparent equities in favor of complainant. And while the court below ruled, as we hold, correctly, upon the points brought to our attention, we believe that the complainant should have an opportunity to be again heard. It is questionable, perhaps, whether the decree, as rendered, would bar another bill. To remove all doubt in this respect, however, the decree below will stand affirmed, so far as to dismiss the bill without prejudice.

COFER *et al.* v. ECHERSON.

Where in an action of right, it appeared that the defendant held title to the real estate by purchase from the school fund commissioner; that on the 18th of January, 1856, he executed an absolute deed of the premises to S. and B., who, on the same day, executed to him a deed of defeasance, conditioned to reconvey to him, upon his paying a certain sum of money in one year from date, which makes time of the essence of the contract, and provides that in case of a failure to pay promptly, a promissory note signed by the defendant and C., (one of the plaintiffs), the obligors reserve to themselves the right to enter upon, and take possession of, the premises, and declare the contract forfeited; that the time of payment was extended by S. and B. to January 18, 1858; that on the 11th of February, 1858, S. and B. executed to the plaintiffs a bond for the conveyance of the land, upon the payment at certain times, of a given sum of money, and giving them possession thereof; and that one of the plaintiffs took the bond from S. and B. with notice of the bond held by the defendant; and where, while the action of right was pending, the plaintiffs filed their petition for the appointment of a receiver, to take charge of the property, on the ground of the insolvency of the defendant, and thereupon

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the court appointed a receiver; *Held*, That the court erred in appointing a receiver.

Appeal from the Hamilton District Court.

WEDNESDAY, OCTOBER 13.

The plaintiffs bring this action to recover possession of the south-west quarter of the south-west quarter of section sixteen, township eighty-seven, north range twenty-six west, on which is situated a mill and appurtenances. The defendant holds by purchase from the school fund commissioner. On the 18th of January, 1856, he executed a deed, which was absolute in its form and terms, conveying the land to Thomas Snell and Hiram Butterworth, who, on the same day, executed to him a deed of defeasance, conditioned to reconvey to him, upon his paying a certain sum of money in one year from date. This time for payment was afterwards extended one year, which brought it to the 18th of January, 1858. On the 11th of February, 1858, Snell and Butterworth, under that name, (who appear from plaintiffs' petition to have been partners in business under that firm), executed to the petitioners a bond for the conveyance of the land, upon the payment at certain times of a given sum of money, and giving them possession thereof. The bond from Snell and Butterworth to Echerson, makes time of the essence of the contract, and provides that, in case of a failure promptly to pay a promissory note, signed by the defendant and John Cofer, (one of the plaintiffs), the obligors reserve to themselves the right to enter upon, and take possession of the premises, and declare the contract forfeited. The defendant's answer avers that the plaintiff, Cofer, was a party to the note given to Snell and Butterworth, to secure the payment of which the said deed was given, and that the plaintiffs well knew that the deed was given as such security, and had the force and effect of a mortgage only.

During the pendency of the action, (which is not yet de-

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cided), the plaintiffs filed their petition for the appointment of a receiver, on the ground that the defendant was insolvent, which was granted, and a receiver was named. From this order, the defendant appeals.

Hull & Dennison, for the appellant.

D. O. Finch, for the appellees.

WOODWARD, J.—This appeal is from the appointment of a receiver. The action is in the nature of ejectment, to obtain possession of the land. In the inquiry as to the propriety of appointing a receiver, the whole case will be looked at.

We do not notice the question whether a receiver can be appointed in a mere action at law, any farther than to prevent silence being construed into an assent to the affirmative of the proposition. So far as there may be a question, it is left open.

There are no equitable proceedings pending in relation to the property, which, besides the land itself, consists of a grist and saw mill, except this application for a receiver. There is a contest as to the right of possession, and this is intimated by an action at law for the recovery of the same. The petitioners present no peculiar circumstances, nor any of particular alarm or danger. The defendant is in possession, who purchased from the school fund, and who says in his answer, that he made the improvements, and that he is, more than any one else, interested in their preservation and care, since they constitute his support, and are worth much more than the incumbrances upon them. The petitioners represent only, that they believe him to be insolvent, and that the estate and mills cannot be left in his possession without loss and injury to the plaintiffs. In short, the only reason urged for the appointment of a receiver, is the alleged insolvency of Echerson. But Mr. Story in 2 Equity Jurisprudence, section 836, says that mere poverty is not, of itself, sufficient ground. And fur-

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ther, it does not seem to be the practice of the courts to appoint, when the controversy is upon a mere question of legal right, or when the party can assert his right by a direct action at law, as for possession. 2 Story's Equity, section 828, *et seq.*; 2 Dan. Ch., chapter 38. Again: the court does not appoint, unless it believes, so far as there appears, that the applicant will recover. 2 Dan. Ch., chapter 33, 1954; 2 Story's Equity, chapter 21.

In the present case, there appears to be some obstacles to the plaintiffs' recovery, as now appears. They hold a bond for a conveyance from Snell and Butterworth, which gives them the possession. But S. and B. did not possess this right. Their contract with Echerson gives them the power, upon his default, to declare the contract forfeited, and to take possession. This requires an action on their part, and the case does not show any such act—any notice putting an end to the contract. *Fulwider v. Wilford*, Morris, 323. Snell and Butterworth, therefore, had not yet acquired a perfect right to possession against their vendee, Echerson; and consequently they could not convey such a right to the plaintiff.

For these reasons, without looking for others, we are of opinion that the receiver should not have been appointed, and the order is therefore reversed, and the cause remanded.

 HOOVER v. RHOADS.

It is not error for a justice of the peace to allow the jurat to a petition in replevin, to be amended so as to show that it was sworn to, and then to overrule a motion made previously to dismiss the suit, because the petition was not sworn to.

An affidavit to a petition in replevin, signed "G. W. & R. H.," and sworn to by both the plaintiffs, is not objectionable.

Where in an action of replevin, before a justice of the peace, damages are claimed in the original notice served on the defendant, the plaintiff is entitled to recover all the damages he had sustained by the illegal detention of the property.

Hoover v. Rhoads.

Appeal from the Boone District Court.

WEDNESDAY, OCTOBER 13.

This was a writ of error from the district court of Boone county, to reverse the judgment of a justice of the peace, in an action of replevin. The errors are: 1. That the justice refused to dismiss the suit on the motion of the plaintiff; 2. That he permitted the jurat to the petition to be so amended as to show that it was sworn to by plaintiffs, at the time of filing; 3. In rendering judgment against defendant for damages and costs. The district court reversed the judgment, and remanded the cause to the justice, from which judgment the plaintiffs appeal.

J. A. Hull and *T. Ellwood*, for the appellants.

Cassady, for the appellees.

STOCKTON, J.—I. The defendant moved to dismiss the petition, because, as he alleged, it was not sworn to as required by law. At the time the motion was made, it appears that the justice had omitted the words “sworn to” in the jurat; and that the same was signed by the plaintiffs as “G. W. & R. Hoover.” The justice permitted the affidavit to the petition to be amended, by adding the words “sworn to;” and this embraces the first and second errors assigned by the defendant, to the proceedings before the justice. We think there was no error in the amendment allowed by the justice, and in his then overruling the motion made by defendant. Such amendment is allowed by the Code, section 2511. It was no objection that the affidavit was signed “G. W. & R. Hoover”—and that it was sworn to by both plaintiffs.

II. The justice of the peace rendered judgment against the defendant for five dollars damages, and for costs. It is urged by the defendant, that as the plaintiff did not claim

Rawson v. Guiberson.

either damages or costs in the original petition, and as the officer delivered the property to them upon the writ of replevin, they were not entitled to a judgment against him, for either damages or costs. We think there was no error in the judgment of the justice. Whether the property sought to be replevied by him, was obtained or not, he was entitled to recover all the damages he had sustained by the illegal detention. Damages were claimed by the notice served on defendant—and the transcript of the justice shows that damages were claimed. The costs followed the judgment, as a matter of course.

The judgment of the district court will be reversed, and judgment rendered affirming the judgment of the justice, with costs.

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A plea to the jurisdiction of the court, or of another action pending, is as proper and legitimate now, as before the Code.

Where a former suit on the same cause of action is dismissed, after the defendant pleads such former suit in abatement, the plea should be sustained.

Where it does not appear from the pleadings or evidence, in a cause in which the defendant pleads in abatement a former action pending, whether the former suit was dismissed *before* or *after* the filing of the plea, and where it appears from the record that the court below sustained the plea in abatement, it will be presumed that the former action was not dismissed until after the plea was pleaded.

Where in an action the defendant pleaded in abatement another action pending in the Warren district court, upon the same promises set forth in the petition, to which the plaintiffs replied, averring *that since the commencement of the present action*, the said plaintiffs had dismissed the suit in defendants' plea mentioned, to which there was no rejoinder; and where it appeared from the record, that the cause was submitted to the court upon the issues, and that it was ordered that the plea in abatement be sustained, and the suit dismissed; *Held*, That there was no error in the decision of the district court.

Appeal from the Polk District Court.

WEDNESDAY, OCTOBER 13.

This was an action to recover the amount of two promissory notes, made by defendants to plaintiffs. The defendants pleaded in abatement, another action pending in the Warren district court, upon the same promises set forth in the petition in this suit. Replication, denying that there was any such record as that set up and relied upon by defendants in their plea; and further, that the said cause pending in the Warren district court, was withdrawn prior to the commencement of the present action. Defendants rejoined, denying the allegations contained in the replication. Plaintiffs afterwards filed an amended replication, to the effect that since the commencement of the present action, the said plaintiffs had dismissed the suit in defendants' plea mentioned. To this, there was no rejoinder. The cause was submitted to the court upon the issues joined; and "all things touching the same being inspected," it was ordered that the plea in abatement be sustained, and that said cause be dismissed. Plaintiffs appeal.

J. H. Gray and Cole & Jewett, for the appellants.

Bates & Phillips, for the appellees.

WRIGHT, C. J.—Plaintiffs have suggested some objections to the sufficiency of the plea in abatement, which relate more to its form than substance. No such objections were made, however, in the court below, and we will not therefore consider them.

It is also urged, that under the Code all technical forms of actions and pleadings are abolished; that a plea in abatement, is a technical plea; that all pleas must be, in the nature of pleas, in bar; that this was not such, but presented an immaterial issue; and therefore, should have

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been overruled. In this position, we cannot concur. While all technical forms of actions and pleadings are abolished, (Code, section 1733), it by no means follows that we have abolished all the rules and principles which formerly governed pleadings and trials in common law actions. *Baltzell v. Nosler*, 1 Iowa, 588. A plea to the jurisdiction, or of another action pending, is as proper and legitimate now as before the Code. So it is in case of a misnomer, or of the misjoinder or non-joinder of parties. The consequences to result, when the plea is sustained, under the Code, as compared with the common law practice, presents a different question. And it is with reference to such consequences, that the Code provides so liberally for amendments. See sections 1755-60.

It is next insisted, that where two actions are pending, the plaintiff should be driven by rule, or otherwise, to elect upon which he will proceed. This argument has no place here, for the reasons that plaintiffs, by their replications, aver that the former action was not pending. And, therefore, without considering the correctness of their position in a proper case, we need only say, that according to their own pleadings, there was no other action pending upon which they could elect to proceed.

But in any event, it is said that plaintiffs were entitled to a trial on the issues, and that the court should not, upon the pleadings alone, have dismissed the case. This position assumes that the issues made were not tried upon proof made, but upon the pleadings. Of this, however, there is nothing to satisfy us. The cause was submitted upon the issues joined, and for anything that appears to the contrary, was heard in the usual manner, upon the respective proofs and allegations of the parties. It is said that the record attached to the plea, is not full. There is nothing in the record itself, to rebut the presumption that it is full. But if there was, this would not prevent the introduction of other proof upon the trial of the issues.

And finally, appellants urge that there was no denial of their amended replication; that it was, therefore, to be ta-

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ken as true; and if so, the finding should have been in their favor. What is that replication? An averment that since the commencement of the present action, plaintiffs have dismissed the suit mentioned in defendants' plea. If dismissed before the commencement of the present suit, of course the plea should have been overruled. If dismissed after, and before plea pleaded, the authorities are not uniform as to the effect. When dismissed after plea pleaded, all the cases agree in holding that the plea should be sustained. Taking the amended replication as true, it only appears that the first action was dismissed after this suit was commenced, but whether before or after plea pleaded, is not stated. Upon no fair principle can we presume, that it was before the plea in abatement was filed.

The argument stands thus: The amended replication being undenied, it is to be taken as true. It is true, therefore, that the first action was dismissed after the present one was commenced. But whether dismissed before or after plea pleaded, is not stated. If after, then the order of the court sustaining the plea, was manifestly right. Every presumption is in favor of the action of the district court; that court, after duly inspecting the whole case, having decided adverse to the position of the plaintiffs, we are compelled to conclude from this record, that the fact as presented, justified the position that the first suit was dismissed after plea pleaded. We need not, therefore, determine what would have been the effect, if it appeared that the first action was dismissed before plea filed. If the finding of the court would have been erroneous in that case, it would be nevertheless correct, under the other hypothesis; and as the latter will sustain the judgment below, we should be governed by it. *Conrad & Co. v. Baldwin*, 3 Iowa, 207; 1 Chitty on Pleadings, 272.

Judgment affirmed.

The State of Iowa v. Axt.

THE STATE OF IOWA v. AXT.

Section 2914 of the Code, which requires that an indictment, when found by the grand jury, and indorsed "a true bill," by the foreman, must be presented to the court by the foreman, in their presence, and marked "filed," by the clerk, is directory merely, and the failure of the clerk to make the indorsement, is not sufficient to invalidate the proceedings.

Where an indictment was properly indorsed by the foreman of the grand jury, and was marked filed by the clerk, but the indorsement of the clerk did not show that it was "presented to the court by the foreman in the presence of the grand jury"; *Held*, That the requisites prescribed by section 2916 of the Code, sufficiently appeared by the indorsement on the indictment.

It is not essential to the validity of an indictment, that it should appear from the indorsement of filing by the clerk, that it was "presented to the court by the foreman in the presence of the grand jury."

Where an indictment charged the defendant with unlawfully selling intoxicating liquors, by the glass or dram, on the first day of September, 1857; *Held*, That the district court had jurisdiction of the offense.

Appeal from the Lee District Court.

WEDNESDAY, OCTOBER 13.

Indictment for selling intoxicating liquors by the glass or dram. The indictment was properly indorsed by the foreman of the grand jury, and was marked filed by the clerk. There was, however, no indorsement to the effect, that it was "presented to the court by the foreman in the presence of the grand jury." The defendant moved the court to quash the indictment, for the reason that it did not appear from the indorsement of the clerk thereon, that the same was "presented to the court by their foreman in the presence of the grand jury." This motion was overruled by the court.

Upon the overruling the motion to quash, the defendant demurred to the indictment, upon two grounds: 1. That the grand jury had no authority to find the same; 2. That the facts charged do not constitute a public offense—which demurrer was overruled, and the defendant convicted. From this judgment he appeals.

J. M. Beck, for the appellant.

An indictment must show, or it must appear from the record, that it was “presented in open court, by the foreman of the grand jury, and in their presence.” The following cases and authorities are in point: *The State v. Glover*, 3 G. Greene, 249; *Ramy v. The People*, 3 Gilman, 71; *Hill v. The State*, 9 Yerg., (Tenn.), 198; *Chapell v. The State*, 8 Yerg., 166; Wharton’s Am. Crim. Law, 237; 1 Chit. Crim. Law, 324. The case of *The State v. Glover*, *supra*, is sustained by the following cases, decided by this court, or the doctrine therein announced is recognized by the following cases: *Rockledge v. The State*, 1 Iowa, 167; *Harriman v. The State*, 2 G. Greene, 270. The following cases sustain the principle contended for: *Commonwealth v. Carwood*, 2 Virginia Cases, 527; *Brown v. The State*, 7 Hump., 155; *Morris*, 332; 3 Scammon, 85; 2 Gilman, 551. It will be observed that the provisions of the Revised Statutes, (under which *The State v. Glover* was decided), are not materially different from the provisions of the Code. Code, sections 2914–2916; sections 1 and 8, 2943, 2; Rev. Stat. 1843, 152, section 34.

The omission of the indorsement, or record entry, to which exception is made, could not be corrected or amended. *The State v. Glover*, 3 G. Greene, 254; *Hill v. The State*, 9 Yerg., 204.

Samuel A. Rice, Attorney General, for the State.

STOCKTON, J.—We do not think that such an indorsement was essential to the validity of the indictment, or that the want of it, was a good reason for quashing it. The Code, (section 2914), requires that “an indictment, when found by the grand jury, and indorsed ‘a true bill,’ by the foreman, must be presented to the court by the foreman, in their presence, and marked ‘filed,’ by the clerk.” Under a provision somewhat similar, in the act of 1839, (Rev.

Stat. ,152, section 34), it was held by this court, in the case of *The State v. Glover*, 3 G. Greene, 249, that the omission of the clerk to indorse upon the indictment, that it was presented in open court by the foreman, in the presence of the grand jury, was fatal to the proceeding, and that the indictment should have been quashed. There is this difference, however, between the act of 1839 and the Code, by which the present cause must be decided, that while the former contains no such provision, it is expressly provided by the latter, under the head of "forms and requisites of indictments," (section 2916), that no indictment shall be quashed, if it can be understood: "1. That the same was presented to some court having jurisdiction of the offense charged." * * "8. That the indictment is indorsed 'a true bill,' by the foreman, and marked 'filed,' by the clerk."

It sufficiently appears by the indorsement made by the clerk, that it was presented to the district court—a court having jurisdiction of the offense charged. In order that it should so appear, it was not indispensably necessary that the clerk should further indorse, that the indictment was "presented to the court by the foreman, in the presence of the grand jury." This provision of the statute is directory merely, and the failure of the clerk to make the indorsement, is not sufficient to invalidate the proceeding. We think the requisites prescribed by section 2916, sufficiently appear by the indorsements on this indictment. In this view of the subject, it is unnecessary for us to inquire, whether the district court erred in directing the clerk to insert in the indorsement on the indictment, the words wanting to make it conform to the requisites prescribed by section 2914 of the Code.

Under the act of January 22, 1855, section 6, 61, any person selling intoxicating liquors, as charged in the indictment, is deemed guilty of misdemeanor; and upon a first conviction shall pay a fine of twenty dollars and costs of prosecution, and shall stand committed ten days, unless the same be sooner paid. Although the constitution pro-

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vides, that "all offenses less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days, shall be tried summarily before a justice of the peace, or other officer authorized by law, on information under oath, without indictment, or the intervention of a grand jury, (Art. 1, section 11); yet it is further provided by the same instrument, that "all offenses, misdemeanors and crimes that may have been committed before the taking effect of this constitution, shall be subject to trial and punishment in the same manner as they would have been had not the constitution been made. Art. 12, section 3. The offense, in this instance, is charged to have been committed on the first day of September, 1857, which was before the taking effect of the present constitution. The district court had, therefore, jurisdiction of the offense, and the demurrer was properly overruled.

The views above expressed, we believe, dispose of all the errors assigned, and the judgment will be affirmed.

PARTRIDGE v. PATTERSON.

It is within the discretionary power of a court to refer a question of variance as to the date of a written instrument, which the court is unable to determine, to the jury.

Where in an action on a promissory note, the defendant objected to the admission of the note in evidence, upon the ground of an alleged variance between the date of the indorsement of the note and that of the copy attached to the petition; and where the court, being unable to determine, on account of the peculiar manner in which the figures were made, submitted the question of variance to the jury, under proper instructions; *Held*, That the proceeding was not erroneous.

In an action against the guarantor of a promissory note, where the guarantee is written on the back of the note, the plaintiff is not required to prove the signature of the guarantor, unless the same is denied under oath.

Partridge v. Patterson.

Appeal from the Des Moines District Court.

WEDNESDAY, OCTOBER 13.

This action is brought against the defendant as the guarantor of a promissory note. The guarantee was written on the back of the note, and reads as follows: "July 21, 1847, I guarantee the payment at maturity of the within note, for value received." Upon the trial, the defendant objected to the admission of the note in evidence, upon the ground of an alleged variance between the date of the indorsement of the note offered, and that of the copy set out in the petition. The court being unable to determine, on account of the peculiar manner in which the figures were made, submitted the question of variance to the jury, under proper instructions. To this the defendant excepted. The defendant also contended, that the plaintiff must prove the signature to the indorsement, but the court ruled that he was not held to do this, there being no denial under oath. To these rulings defendant excepted, and now assigns the same for error.

Browning & Tracy, for the appellant.*David Rorer*, for the appellee.

WOODWARD, J.—If the course taken by the court afforded cause of complaint, it would be on the part of the plaintiff, rather than of the defendant, because a finding against the plaintiff, would put him to the necessity of a new action; whereas, if the court decided it, he could avail himself, probably, of an amendment, instead of being sent out of court. But there was no error in the proceeding. If the court was unable to determine satisfactorily upon the date, it was within their discretionary power to refer the question to the jury. *Jefferson Co. v. Savary*, 2 G. Greene, 238; *Converse v. Warren*, 4 Iowa, 158.

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The ruling of the court in relation to proof of the signature of the guarantor, was correct. The point has been decided several times under the different statutes. *Steinhelber v. Edwards*, 2 G. Greene, 366; *Chambers v. Games*, 2 Ib., 320; *Lyon v. Bunn*, ante, 48.

The judgment is affirmed.

WALKER, Adm'r. v. LATHROP.

Where it appears from the exemplification of a foreign judgment, that the defendant appeared, and submitted to the jurisdiction of the court, he cannot in a subsequent action on the judgment, object that he had no notice of the former suit.

An allegation in a petition, not denied by the answer, is to be taken as true, and requires no proof.

Where a party seeks to recover for money paid as surety for another, his cause of action accrues at the time when the money is paid; and from that time, the statute of limitations commences to run.

Where in action to recover money paid as surety for the defendant, under a judgment rendered in April, 1849, the answer alleged: 1. That more than ten years had elapsed since the recovery of the said judgment; 2. That the defendant did not *undertake and promise* at any time within five years, or within ten years, or at any time since the taking effect of the Code; and the court found for the plaintiff, and rendered judgment in his favor; *Held*, That the judgment was correct.

Appeal from the Henry District Court.

WEDNESDAY, OCTOBER 13.

In October, 1839, Foster & Easton recovered judgment in the circuit court of Dearborn county, Indiana, against the defendant and one Folbre. Prior to 1849, Bailey became what is termed in the record, "replevin bail," for the security and payment of said judgment; and in April of that year, the said judgment, by a proceeding in *scire facias*, was revived against the said defendants and the said Bailey. This action is brought by the administrator

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of Bailey, to recover the amount paid by decedent, in discharge and satisfaction of said judgment. Judgment for plaintiff, and defendant appeals. The other facts will appear in the opinion of the court.

Palmer & McFarland, for the appellant.

Marsh & Craig, for the appellee.

WRIGHT, C. J.—It is first objected, that defendant had no notice of the pendency of the action originally brought by Foster & Easton, in Indiana, nor of the proceeding by *scire facias*. The record discloses, however, that he appeared to the action, and submitted to the jurisdiction of the court. Having so appeared, he cannot now object that he had no notice—or rather it is immaterial whether he was or not, served with notice.

Appellant next insists, that there was not sufficient evidence to justify the judgment in favor of plaintiff. In what respect it was insufficient, under the state of the pleadings, we do not perceive. The answer of defendant consists of ten clauses, seven of which set up, or attempt to set up, the statute of limitations. Of the others, the *second* may, for the purpose of this case, be treated as a plea of *nul tiel record*; the third insists that said judgment is paid; and the seventh, denies that Bailey became “replevin bail,” or that he did so at the request of the defendant. The transcript of the judgment, and the proceedings by *scire facias*, are regularly certified, and show conclusively, that there is such a record as that relied upon by plaintiff. Of the payment of the judgment by defendant, there was no proof. That Bailey did become “replevin bail,” was settled by the *scire facias* proceedings, in Indiana—and there is nothing in the record, or otherwise, to contradict this. After the appearance of defendant to those proceedings, and after the finding of the court in Indiana, that Bailey was liable as such surety, it was not ne-

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cessary for plaintiff to show, that defendant requested Bailey to become his bail.

In argument, it is insisted that there was no evidence showing that Bailey had paid said judgment. Such payment is not denied by the answer, however, and proof upon this subject was therefore unnecessary. We do not say that the proof was insufficient, upon the supposition that there was a denial. This might involve the question, as to how far the return of the sheriff upon an execution issued on the judgment in Indiana, would be evidence as to who paid the same. Without discussing that point, it is sufficient to say, that it is expressly averred in the petition, that the judgment was paid by the sale of the property of the plaintiff's intestate. This is in no manner denied, and is therefore to be taken as true.

Finally, it is urged, that judgment should have been for the defendant, upon so much of his answer as sets up the statute of limitations. If, however, we take as true all that is stated in this portion of the answer, the judgment was correct. *First*, the answer sets up that more than ten years have elapsed since the recovery of the judgment in the circuit court of Dearborn county, Indiana. The plaintiff, however, seeks to recover for money paid in satisfaction of this judgment. It was then that his cause of action accrued—that *prima facie*, the statute would commence running, and not when the judgment was rendered. In the next place, the answer insists that defendant did not undertake and promise at any time within five years, or within ten years, or at any time since the taking effect of the Code. Grant that he did not, and how is he benefited? He may not have undertaken or promised within five or ten years, and yet the plaintiff's right of action, may have accrued within one year, or one month, before the commencement of the suit. When was he to pay, and not when did he promise, is the true inquiry. If, therefore, the court below had found for defendant, upon this portion of his answer, it would have been error, and plain-

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tiff would have been entitled to judgment, notwithstanding such finding. As it stands, the finding and judgment were right, under the pleadings, and defendant has no cause for complaint. Without determining, therefore, whether plaintiff's claim was barred by the statute, we simply hold that the statute was not plead, and that the point made by defendant thereon, does not arise.

Judgment affirmed.

WALKER & BROTHERS v. MANNING, Com'r, &c.

Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written contract.

Where the plaintiffs brought an action for the recovery of damages, under a written contract with the Board of Public Works of the State of Iowa, for the erection of the lock and dam at Belfast, on Section No. 18 of the Des Moines River Improvement, and aver in their petition, that in compliance with the contract, they commenced the erection of said lock and dam; and that they were prosecuting the work with all convenient speed, when in the month of April, 1857, the Board of Public Works ordered the work to be stopped, and refused to execute the said contract, and prevented the said plaintiffs from completing the same; and where upon the trial the plaintiffs introduced the contract and specifications, and gave evidence tending to prove the actual cost to the plaintiffs, when completed, of the "masonry laid in lock wall, of cut stone and range-work," and thereupon the defendant introduced G. W. as a witness, who testified that he was the chief engineer of the Des Moines River Improvement at the time, and as such, made with the plaintiffs the contract sued on; that nothing was said when the contract was made, as to the construction of the specifications in regard to the cut stone and range-work masonry in the lock wall; that one of the plaintiffs was interested in the contract for building the lock and dam at Croton, six miles above Belfast, which had been in process of erection during the year 1848, &c., and which was not completed, when the contract sued on was executed; that dams had been partly erected by other contractors at Farmington, &c.; that the specifications referred to were printed and published before the letting of contracts in 1848; that they were generally attached to contracts entered into; that the specifications in relation to "masonry in lock walls," was not susceptible of any misconstruction or misunderstanding; that the witness believed that the plaintiffs understood that the "lock walls, range and course-work," were not to be done as specified;

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that the specifications referred to were a part of the contract ; that at the time the contract was made, the terms of the contract were not intended by the parties, to be understood in a different sense from that expressed upon its face ; and where the plaintiffs, on cross-examination, proposed to prove by the same witness, the following facts: 1. The character of the "masonry in lock walls, cut stone, and range work," done upon the locks at Croton, &c., under similar specifications, and under the direction of the State Engineer ; 2. That the work to be done by them was to be of the same quality as the work on the lock at Croton, then in process of erection ; 3. That the plaintiffs understood from the contract, that the "cut stone, course, or range work," to be done by them, was to be different from the work described in the specifications ; and, 4. That the State Engineer, who made the contract, and the plaintiffs, both understood from it, that the "cut stone, course, or range work," was to be done in a different manner from that described in the specifications—to which evidence the defendant objected, and the same was excluded by the court ; *Held*, 1. That the evidence was not admissible under section 2401 of the Code ; 2. That the evidence was properly excluded.

Appeal from the Des Moines District Court.

WEDNESDAY, OCTOBER 13.

The plaintiffs sue upon a contract made April 15, 1850, with the Board of Public Works of the State of Iowa, for the erection of the lock and dam at Belfast, on Section No. 13 of the Des Moines River Improvement. The plaintiffs aver that, in compliance with the contract, they commenced the erection of said lock and dam, and were prosecuting the work with all convenient speed, when in the month of April, 1851, the Board of Public Works, ordered the said work to be stopped, and refused to execute the said contract, and prevented the said plaintiffs from completing and fulfilling the same ; and they now seek to recover the profits they would have made, if they had been permitted to go on and complete the work ; or, in other words, sue for the damages they have sustained by reason of the rescission of the contract by the Board of Public Works.

Upon the trial, the plaintiffs introduced the contract and specifications, and gave evidence tending to prove the

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actual cost to the plaintiff, when completed, of the masonry laid in lock wall, of cut stone and range-work."

The defendant then introduced a witness, Guy Wells, who stated that he was the chief engineer of the Des Moines River Improvement, at the time, and as such, made with the plaintiff, the contract sued on; that nothing was said when the contract was made, as to the construction of the specifications in regard to the cut stone and range-work masonry in the lock wall; that one of the plaintiffs was interested in the contract for building the lock and dam at Croton, six miles above Belfast, which had been in process of erection during the years 1848, 1849, and 1850, and which was not completed when the contract sued on was executed; that dams had been partly erected by other contractors, at Farmington, Bonaparte, and Bentonsport; that the specifications referred to were printed and published before the letting of contracts in 1848; that they were generally attached to the contracts entered into; that the specifications in relation to "masonry in lock walls," was not susceptible of any misconstruction or misunderstanding; that the witness believed that the plaintiffs understood that the "lock walls, range and course-work," were not to be done as specified; and that the specifications referred to were part of the contract. The witness was then asked, whether at the time it was made, the terms of the contract were intended by the parties to be understood in a different light from that expressed on its face? To which he replied, that it was not, and that no other construction could be placed upon it.

Upon cross-examination, the plaintiffs proposed to prove by the witness: 1. The character for the "masonry in lock walls, cut stone, and range-work," done upon the locks at Croton, Farmington, Bonaparte, and Bentonsport, under similar specifications, and under the direction of the State Engineer; 2. That the work done by them, was to be of the same quality as the work on the lock at Croton, then in process of erection; 3. That the plaintiffs understood by the contract, that the "cut stone, course or range-

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work," to be done by them, was to be different from the work described in the specifications; and, 4. That the State Engineer, who made the contract, and the plaintiffs, both understood from it, that the "cut stone, course or range-work" was to be done in a different manner from that described in the specifications. This evidence being objected to by the defendant, was excluded by the court. From this ruling the plaintiffs appeal, and assign the same as error.

J. C. & B. J. Hall, for the appellants, contended: 1. That the evidence was admissible generally; 2. That it was admissible under section 2401 of the Code; and cited the following authorities: Code, sec. 2400; 1 Greenl. Ev., sec. 278; *Ib.*, sec. 282; *Ib.*, sec. 293; *Rener v. Bank of Columbia*, 9 Wheat., 590; *Bank of Utica v. Smith*, 18 Johns., 230; *Farm. and Mech. Bank v. Champlain Trans. Co.*, 16 Vermont, 52; 18 *Ib.*, 38, 131.

Rankin, Miller & Enster, for the appellee, relied upon 1 Greenl. Ev., sec. 66; *Ib.*, sec. 68; *Ib.*, sec. 275.

STOCKTON, J.—The matter in dispute between the parties, was as to the quality of the work to be done. The plaintiffs claim that they were to put into the lock, masonry of the same quality as that upon the locks at Croton, &c., built under a similar contract, with the same specifications; and in seeking to introduce testimony of the character of the masonry work at Croton, their aim was to have the jury estimate their damages as to the difference between the cost of such work, and the price fixed by the contract. Of the quality of the work to be done by the plaintiffs, we are not informed, as the specifications have not been made a part of the record. But if the work that had been done at Croton, was such as was required to be done by the contract sued on, no injury could have resulted to either party by suffering the witness to give evidence of its character and quality. If it was not, then it was

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proper to exclude the evidence, and not permit the masonry at Croton to be adopted, as the measure of the value of the work to be done by plaintiffs.

It is conceded that the work at Croton was not of the quality required by the specifications. The plaintiffs, however, sought to prove further, that it was the understanding of the parties to the contract, at the time of its execution, that the masonry was to be done in a different manner from that contained in the specifications; and that it was to be of a quality similar to that upon the lock at Croton. We do not see how this testimony could be at all legitimate. By the contract, it was agreed that the work should be done in accordance with the specifications annexed. The offer of the plaintiffs was to show, that it was the understanding of the parties, that the work should not be done according to the specifications, but different therefrom; and that it was not to be of the character and quality therein described, but of the character and quality of the work upon the lock at Croton. To have admitted the evidence, would have been a plain violation of the rule, that "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument." 1 Greenleaf's Evidence, section 275. It is contained in the contract, that the work is to be done under the direction of the engineer having charge of the improvement of the Des Moines river; but no power is conceded to the engineer to do more than change the plan and location of the work—he was not to change the quality or price.

It is claimed that, inasmuch as the witness stated, that he believed the plaintiffs understood that the masonry of the lock walls, was not to be done as specified, that the evidence should have been admitted. By section 2401 of the Code, it is provided that, "where the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party, in which he had reason to suppose the other understood it." We do not see that this provision of the statute ap-

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plies to the present case. There is nothing in the testimony from which it can be inferred, that the terms of the agreement have been intended by the parties in a different sense. The witness states that it was not capable of any misconstruction or misunderstanding—that only one construction could be put upon it. The understanding of the plaintiffs that the masonry on the lock walls was not to be done as specified, was not a sense or construction placed by them upon the terms of the contract, but arose from something entirely outside of it; and in this instance, is admitted to have arisen from the fact, that the State had accepted and paid for work of an inferior quality, upon other locks, built under contracts containing the same specifications—in one of which contracts, viz : that for the lock and dam at Croton, one of the plaintiffs was interested.

The question is not, whether the engineer of the State, after the work was completed, would have accepted it, although not done in conformity to the specifications, as the work of inferior quality on the other locks, had previously been accepted and paid for; but it is whether the State might not insist upon the work being finished according to the specifications, and refuse to pay the contract price, except for masonry of the stipulated quality and character. In our view of the matter, there is nothing in the contract or the testimony, to prevent her from so doing; and, as little reason can there be for denying her the right to insist, that in estimating the plaintiffs' damages, they shall be allowed, as and for their profits, nothing more than the difference between the cost of the stipulated quality of work, and the contract price.

Judgment affirmed.

SHAPLEIGH *et al.* v. ROOP *et al.*

Section 1847 of the Code, in relation to attachments, does not mean that the original petition in the suit, must constitute that in attachment

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also, when the writ is sued out at the commencement of the suit; but that there must be a separate petition, if it is sued out subsequent to the institution of the action.

The petition for a writ of attachment, may be either the original petition in the action, or a separate one, filed at the same time.

Where a plaintiff commenced his action by filing two petitions at the same time—one claiming to recover on a promissory note, for \$648,54, with interest after maturity, and claiming one thousand dollars damages, and the other asking an attachment against the defendants, stating that they were indebted to the plaintiffs in the sum of \$671,09, which was then due, and setting forth the cause for an attachment under the act of 1858, which was properly sworn to; and where the defendants moved to dissolve the attachment, which motion was sustained; *Held*, That the court erred in quashing the attachment.

Appeal from the Mahaska District Court.

WEDNESDAY, OCTOBER 13.

On the 12th of December, 1857, the plaintiffs filed two petitions in the clerk's office. The one, in common form, claiming to recover on a promissory note of \$648,54, with interest after maturity, and laying his damages at one thousand dollars, which was not sworn to. The other petition was for an attachment against the defendants, stating that they were indebted to the plaintiffs in the sum of \$671,09, which was then due, and setting forth the cause for an attachment under the act of 1853, and which is properly stated and is sworn to. The defendants moved to dissolve the attachment, because the petition is not sworn to; does not state any cause for which an attachment could issue; and because the petition sets up one cause of action, and the affidavit sets up a different claim and cause of action. The motion was sustained and the attachment dissolved, and the plaintiffs appeal.

W. H. & J. A. SeEVERS, for the appellants.

Crookham & Fisher, for the appellees.

WOODWARD, J.—The cause for an attachment is well

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stated under the act of 1853. But the principal objection raised is, that there are two petitions, whilst the attachment was made at the commencement of the action. The defendant urges that when the attachment is sued out in the beginning of the suit, there can be but one petition; and that the petition stating the cause of action, must contain the cause for the attachment, and must be sworn to.

We do not so understand the law. The proceedings in attachment are but auxiliary, and the petition for it may be either the original petition in the action, or a separate one filed at the same time. Section 1847 of the Code does not mean that the original petition must constitute that in attachment also, when this is sued out at the commencement; but only that there must be a separate petition, if it is sued out subsequent to the institution of the action. Both methods have been practiced at the commencement of actions, but the better practice is to file a separate petition for attachment in all cases.

The sums stated in the petition for the attachment, is in compliance with section 1849 of the Code, which requires a statement, as nearly as practicable, of the amount actually due, as a guide to the sheriff. And this requirement constitutes one of the reasons why the petition for an attachment, should be separate from the original petition in the action.

It being our opinion that the court erred in sustaining the motion, we do not consider whether the plaintiff should have been permitted to amend.

Jndgment reversed.

TOWSLEY v. OLDS.

Where an action was brought on an agreement in writing, as follows:—

“State of Iowa, Clayton County, 1855. We, the undersigned, agree to pay the sum of money annexed to our names, as subscribed by us in our own handwrite, whenever the county judge of Clayton county,

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shall certify on the back of this paper, that a good and substantial bridge has been built across Turkey River, at Millville, in the county of Clayton, designating also, the person to whom payment shall be made:" to which instrument, it is averred by the petition, the defendant subscribed fifty dollars, and that on the 7th of May, 1857, the county judge of Clayton county, certified on the back of said paper, that a good and substantial bridge had been built across Turkey river, at Millville, in the county of Clayton, and that the several sums of money subscribed, were justly due to the plaintiff; and where the petition was demurred to, and the demurrer sustained by the court; *Held*, 1. That it was not necessary for the plaintiff to aver the consideration upon which the agreement was executed; 2. That it was not necessary for the plaintiff to aver that he had built the bridge; 3. That the fulfilment of the conditions upon which the money was payable, was sufficiently averred.

Appeal from the Clayton District Court.

WEDNESDAY, OCTOBER 13.

Suit on an instrument of writing, which reads as follows: "State of Iowa, Clayton county—1855. We, the undersigned, agree to pay the sum of money annexed to our names, as subscribed in our own handwrite, whenever the county judge of Clayton county shall certify on the back of this paper, that a good and substantial bridge has been built across Turkey river, at Millville, in the county of Clayton, designating, also, the person to whom payment shall be made."

To this instrument, it is averred, that the defendant subscribed the sum of fifty dollars; and that on the 7th of May, 1857, the county judge of Clayton county, certified on the back of said paper, that a good and substantial bridge had been built across Turkey river, at Millville, in the county of Clayton, and that the several sums of money subscribed were justly due to the plaintiff.

To the petition the defendant demurred, and the demurrer was sustained. The plaintiff appeals.

Noble, Odell & Drummond, for the appellant.

McBrearty v. Dyer.

McClintock & Ainsworth, for the appellee.

STOCKTON, J.—The objections urged to the petition upon the demurrer, are that no consideration is shown for the alleged liability of the defendant; and that it is not averred that plaintiff has performed any services, entitling him to sue upon the instrument of writing. It was not necessary for the plaintiff to set out, or aver in his petition, the consideration upon which the agreement was executed, or the money to be paid. That was to be determined by the instrument itself. As the contract was in writing, a consideration for the promise, is to be presumed, in the same manner as if the suit had been upon a sealed instrument at common law. Code, section 975.

As the money was to be paid to the order of the county judge, upon its being shown by his certificate that the bridge was built, and upon his designating the payee, it was not necessary for the plaintiff to aver that he had built the bridge, in order to recover on the agreement the amount subscribed by the defendant. The fulfilment of the conditions upon which the money was payable is sufficiently averred. A promissory note, or an obligation to pay money, to the order of another, has, when endorsed, always been held sufficient to enable the holder to recover. Story on Promissory Notes, sec. 36; Edwards on Bills and Promissory Notes, 369.

Judgment reversed.

MCBREARTY v. DYER.

An appeal from a justice of the peace, whether allowed by the justice or the court, must be taken and perfected within twenty days from the rendition of the judgment.

Appeal from the Keokuk District Court.

WEDNESDAY, OCTOBER 13.

Suit commenced before a justice of the peace, and judgment rendered against the defendant, on the 7th of June,

McBrearty v. Dyer.

1856. On the 26th day of June, as appears from the transcript of the justice, the defendant filed a bond for an appeal, and the appeal was allowed. Notice of the appeal was served on the plaintiff, on the 4th day of September, 1856. At the September term of the district court, a rule was issued to the justice, requiring him to amend his transcript, in relation to filing the bond and allowing the appeal, to which he made the following return: "I left home on the 15th of June, and did not return until about the 20th of July. I told Mr. Casey, the defendant's attorney, a day or two after the trial, that I was going away, and I further told him, or the defendant himself, before I left home, that if I was not at home when they filed a bond, they could give it to Charles Rigdon, and he could file it, and I would allow an appeal. I think this was told them a day or two before I started to Nebraska. When I came back home, the bond was among the papers marked on the back by Charles Rigdon, as I had directed, filed June 26 1856. I signed my name to it and approved the bond, about the 20th or 22d of July, 1856, and allowed the appeal." Upon this return being made, the plaintiff moved to dismiss the appeal, for the reason that the appeal was not taken and allowed within twenty days from the rendition of the judgment, which motion was sustained by the court.

On the 27th day of September, 1856, the defendant presented to the clerk of the district court his petition, asking for the allowance of an appeal in said cause, setting forth substantially the foregoing facts, upon which the clerk allowed an appeal, upon the filing of the proper bond. At the ensuing July term of the district court, the plaintiff again moved to dismiss the appeal for similar reasons, which motion was sustained and the appeal dismissed. The defendant appeals.

Charles Negus, for the appellant.

E. L. Benton, for the appellee.

Demoss v. Noble.

STOCKTON, J.—If the question for our consideration was, whether there was error in the judgment of the court dismissing the appeal allowed by the justice, we should be inclined to doubt the correctness of the decision of the court dismissing that appeal. But the appeal to this court is from the judgment of the district court, dismissing the appeal allowed by the clerk. In this judgment we think there was no error. We think the true interpretation of section 2330 of the Code is, that the appeal, whether allowed by the justice or by the clerk, must be taken and perfected within twenty days from the rendition of the judgment.

Judgment affirmed.

DEMOSS v. NOBLE.

Where a rule of the district court regulated the time of making application for a change of venue; and where on the morning of the day set for the trial of the cause, the defendant filed his motion for a change of venue, founded upon an affidavit, that the plaintiff had such an undue influence over the inhabitants of the county, that he could not expect an impartial trial, which motion was made without previous notice to the adverse party, and without the showing of any cause why it was not sooner made; and where the plaintiff filed a counter-affidavit, and moved to strike the application for a change of venue from the files, for the reason that it was not filed within the time required by the rules of court—which motion was sustained; *Held*, That the court did not err in overruling the application for a change of venue.

Where in an action to recover for materials furnished, and work and labor performed, in the erection of a house, under a written contract, the court charged the jury as follows: "That if the defendant made the first payment in pursuance of the contract, with a full knowledge of the kind of house the building was—if he was present while plaintiff was building the house, and gave his assent to the manner in which plaintiff was building the same—and if he admitted that he was satis-

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fied with the building, when the same was finished, and thereupon took possession—these circumstances tend to prove that the building was finished according to the contract;" *Held*, That the instruction was not erroneous.

Where in an action to recover for materials furnished, and work and labor performed, in the erection of a house, under a written contract, there was evidence tending to show that after the house was finished, the plaintiff said to defendant, that if the mortar did not become hard, and make a cement within three months, he would not ask the defendant for the last payment; and where witnesses were introduced, some of whom testified that it did become hard, and others that it did not; and where the court instructed the jury, "that if plaintiff said to defendant, he would not call upon him for the last payment, if the cement did not prove to be better, this would not defeat the plaintiff's action, unless the proposition was acceded to by defendant;" *Held*, 1. That there was no objection to the instruction; 2. That the plaintiff was not bound by the promise, for the reason that there was no mutuality.

Appeal from the Appanoose District Court.

WEDNESDAY, OCTOBER 13.

The errors assigned relate to the refusal of the court to grant a change of venue, and to certain instructions given at the request of the plaintiff, which will be found stated in the opinion of the court. Defendant appeals.

Kelsey & Kelsey, for the appellant.

Ives & Perry, for the appellee.

WRIGHT, C. J.—This case was commenced in Monroe county, and on plaintiff's motion at the June term, 1857, the venue was changed to Appanoose county. At the September term, 1857, of that court, and on the morning of the day set for the trial of the cause, the defendant filed his motion for a change of venue, founded upon an affidavit, that the plaintiff had such an undue influence over the inhabitants of the county, that he could not expect an impartial trial. Plaintiff filed a counter-affidavit, and a motion to strike this application from the files, for the

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reason that it was not filed within the time required by the rules of court. This motion was sustained, and the defendant excepted, and now assigns the same for error.

It is immaterial, so far as the defendant is concerned, whether his motion for a change of venue was overruled, or stricken from the files. If his motion was too late, under the rules of court, or the law, it should have been overruled, and it could make no difference to him, that it was disposed of under the motion of plaintiff, in the manner stated in this record. If, on the other hand, it should have been sustained, it was error to sustain the motion of plaintiff. Was there error, then, in refusing the change of venue, or in sustaining this motion to strike the application from the files? We cannot say that there was. In the ninth judicial district, where this case was tried, as well as in most of the other districts of the State, the time of making these applications is regulated by rule—a rule, which in no manner conflicts with the law, but is well calculated to carry out its spirit, and insure its speedy administration. Under this rule, an application made on the morning of the day fixed for the trial of a cause, without previous notice to the adverse party, and without the showing of any cause why it was not sooner made, may properly be overruled. If the court below, in the exercise of a sound discretion, with a full knowledge of all the circumstances, should sustain the application, this court would not interfere. Neither will we, where, as in this case, it is overruled, and the change of venue refused.

Plaintiff seeks to recover for materials furnished, and work and labor performed upon a certain house erected for the defendant, under a written contract. At the request of plaintiff, the court instructed the jury: "That if the plaintiff made the first payment, in pursuance of the contract, with a full knowledge of the kind of a house the building was—if he was present while plaintiff was building the house, and gave his assent to the manner in which plaintiff was building the same—and if he admitted that he was satisfied with the building, when the same was

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finished, and thereupon took possession—these circumstances tend to prove that the building was finished according to the contract.” To this instruction the defendant excepted, and this is the second error assigned. In this there was no error. The instruction was quite as favorable for defendant as he could reasonably ask. If the jury found all these things to be true, while they might not be conclusive, they would certainly very strongly tend to prove that the contract had been complied with. And to this effect are all the authorities. *Hayden v. Madison*, 7 Greenl., 76; *Hayward v. Leonard*, 7 Pick., 181; *Cutter v. Powell*, 6 S. & R., 320, found in 2 Smith’s Leading Cases, 1; *McCawland v. Cressop*, 3 G. Greene, 161.

There was some testimony tending to show, that after the house was finished, the plaintiff said to defendant, that if the mortar did not become hard, and make a cement within three months, he would not ask him, (defendant), for the last payment. Witnesses were introduced, some of whom swore, that it did become hard, and others that it did not. Upon this subject the court instructed the jury: “That if plaintiff said to defendant, he would not call upon him for the last payment, if the cement did not prove to be better, this would not defeat the plaintiff’s action, unless the proposition was acceded to by the defendant.” Whether, if acceded to by defendant, this would have amounted to a contract which would have barred the plaintiff, we need not stop to inquire. To the rule as stated by the court, there can certainly be no fair objection. The plaintiff was not bound, for the reason that there was no mutuality. *Chitty on Cont.*, 9; *Tuttle v. Love*, 7 Johns., 470; 4 Wheat, 425.

Judgment affirmed.

Hall v. Denise.

HALL v. DENISE.

Where it does not appear from the transcript of a cause, that any exception was taken to the instruction complained of, at the time it was given, the appellate court will not inquire whether or not the instruction was erroneous.

On appeal to the district court, where there has been a trial of the cause before the justice of the peace, a general denial of indebtedness will be presumed to have been made upon the trial, if nothing appears to the contrary upon the record.

Appeal from the Des Moines District Court.

WEDNESDAY, OCTOBER 13.

Appeal from a justice of the peace. Judgment for the defendant, and the plaintiff appeals. The material facts and the errors assigned, appear in the opinion of the court.

J. C. & B. J. Hall, for the appellant.

Browning & Tracy, for the appellee.

STOCKTON, J.—I. The first error assigned, is upon the refusal of the court to grant a new trial. The motion for a new trial was based upon the erroneous instruction of the court to the jury. Whether this instruction was erroneous or not, this court will not inquire, as it does not appear that any exception was taken to the charge of the court at the time it was given. *Rarolins v. Tucker*, 3 Iowa, 213.

II. It is further assigned for error, that there was not before the justice of the peace who first tried the cause, any denial of the plaintiff's cause of action. Since the decision of this court, in *Sinnamon v. Milburn*, 4 G. Greene, 309, it has been uniformly held, that where there has been a trial of the cause before the justice, a general denial of indebtedness will be presumed to have been made upon the trial, if nothing appears to the contrary in the record. The transcript of the justice shows in this case, that there was a trial, and judgment for defendant.

Judgment affirmed.

The State of Iowa v. Rollet.

THE STATE OF IOWA v. ROLLET.

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Where an indictment charged the defendant with selling intoxicating liquors by the glass or dram, on the 14th of October, 1857; *Held*, That the district court had no jurisdiction of the offense charged, and no legal authority to render judgment against the defendant.

The saving clause in section three of the 12th article of the constitution of the State of Iowa, applies only to offenses committed before the same took effect.

Although the time laid in an indictment is not material, and need not be proved as laid, yet where the defendant pleads guilty to the offense alleged, the fact that the State was not confined to the exact time laid in the indictment, and might have proved that the offense was committed at a prior date, cannot operate to uphold the jurisdiction of the district court, not otherwise shown by the record.

Where a defendant pleaded guilty to selling intoxicating liquors by the glass or dram, and being adjudged to pay a fine of fifty dollars and costs of suit, and to stand committed until the fine and costs were paid, he paid the fine and costs before the taking of the appeal; *Held*, That the defendant was not estopped from assigning errors upon the judgment and proceedings of the district court.

Appeal from the Lee District Court.

WEDNESDAY, OCTOBER 13.

The record shows that to an indictment charging the defendant with selling intoxicating liquors by the glass or dram, he pleaded guilty, and was adjudged by the court to pay a fine of fifty dollars and costs of said suit, and to stand committed until the fine and costs were paid. It is further shown by the record, that the fine and costs were paid before the taking of the appeal. The indictment charged the offense to have been committed on the 14th day of October, 1857. The defendant appeals.

J. M. Beck, for the appellant.

Samuel A. Rice, Att'y General, for the State.

STOCKTON, J.—As the time is laid on the 14th of Octo-

Curtis v. Hunting.

ber, 1857, which was after the taking effect of the present constitution of the State of Iowa, the district court had no jurisdiction of the offense charged, and no legal authority to render judgment against defendant. Constitution, article 1, section 11. It is only to offenses committed before the taking effect of the present constitution, that the saving clause applies, which provides that they shall be subject to indictment, trial and punishment, in the same manner as if the new constitution had not been adopted. Constitution, article 12, section 3. Although the time laid in the indictment is not in general material, and need not be proved as laid; yet defendant only pleaded guilty to the charge of selling liquors on the 14th of October, when the new constitution was in force; and the fact that the plaintiff was not confined to the exact time laid in the indictment, and might have proved that the offense was committed before the adoption or taking effect of the new constitution, cannot, under the circumstances, operate to uphold the jurisdiction of the court, not otherwise shown by the record. The jurisdiction is excluded by the constitution, and by the provisions of the statute which affixes the punishment for the act to which the defendant pleaded guilty.

We think the defendant was not estopped from assigning errors upon the judgment and proceedings of the district court, by the fact that he had discharged the fine and costs imposed upon him by the judgment of the court, before taking his appeal.

Judgment reversed.

CURTIS v. HUNTING.

The recording act of this State has no reference to patents for land issued by the United States; and a copy of such a patent contained in the record books of a county, is not admissible in evidence, under section 1228 of the Code; and were it so admissible, there should be some evidence accounting for the absence of the original patent, and the record books should be proved.

Curtis v. Hunting.

Where a defendant filed a motion for a new trial, for the reason that the court refused to give certain instructions, which instructions were copied into the motion; and where on the motion for a new trial being overruled, the defendant excepted, setting out in his bill the motion and instructions; and where it was assigned for error in the supreme court; that the court below erred in refusing to give the instructions asked for by the defendant: *Held*, That it did not appear to the supreme court that such instructions were asked for by the defendant, and refused by the court.

Appeal from the Jackson District Court.

WEDNESDAY, OCTOBER 13.

An action to recover damages occasioned by the overflow of lands, caused by the erection of a mill dam. The material facts appear in the opinion of the court.

S. P. Adams, for the appellant.

D. F. Spurr, for the appellee.

WOODWARD, J.—One error assigned by the defendants, who appealed, is to the refusal of the court to give certain instructions, asked by defendants, as they allege. But, unfortunately, at least in respect to their desire to be heard, these proposed instructions are not before us, nor the refusal of the court, so that we can adjudicate upon them. The defendants first filed a motion for a new trial, for the reason that the court refused to give certain instructions, and these are contained in the motion. This motion was overruled. They then file a bill of exceptions, containing the motion for a new trial, and which itself embraces the supposed instructions. A little reflection will render it manifest, that there is nothing which shows this court, that such instructions were asked by counsel, and were refused by the court. The case is precisely like that of *Herring v. The State*, 1 Iowa, 206—the first paragraph in the opinion of which case, is entirely applicable to the one at bar.

Stevens v. Campbell.

The other error assigned is, that the court permitted the plaintiff to give in evidence, as a proof of his title to the land, which was denied, the record copy of a patent of said lands from the United States to one Clark, from whom the plaintiff claimed, and without a showing to account for the non-production of the original, and without proof that the book was a part of the records of the county. This appears in a bill of exceptions. The recording act has no reference to patents for land issued by the United States, and a copy of such a patent, contained in the record books of the county, is not admissible under section 1228 of the Code; and, were it so admissible, there should be some evidence accounting for the want of the original. Strictly, the books should be proved.

On this assignment, the judgment must be reversed.

STEVENS v. CAMPBELL.

Where a party to a suit calls upon his adversary to answer or reply under oath, and such answer or replication is made, he is not entitled to a continuance of the cause, in order to procure the attendance of the party making the answer or replication under oath, as a witness, to testify concerning the matters embraced in the sworn answer or replication.

Where in an action on a joint promissory note, the plaintiff offered in evidence a note signed by the defendants, to the introduction of which they objected, on the ground that the copy of the note appended to the petition was signed by one of the defendants only; and where the plaintiff asked leave to amend the petition, so far as to affix the name of the other defendant to the copy of the note, in support of which application, one of the attorneys stated professionally, that he had seen the name of the said defendant on the said copy of said note; and where the court being of the opinion that the name of said defendant had been worn off the said copy of said note, by the frequent handling of the papers, permitted the amendment to be made, and admitted the original note in evidence; *Held*, That the proceeding was not erroneous.

Where a party to a suit issues a subpoena for his adversary, to appear and testify in the cause, which is returned not served, he cannot be

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admitted as a witness for himself, under sections 2421 and 2422 of the Code. In order to make himself a competent witness, he must show that the other party has been served with a subpoena, and that he has failed to appear.

Under section 970 of the Code, the notice required to be given by a surety to the holder of a promissory note, to proceed by suit against the principal, must, in order to release the surety from liability, in case of the subsequent insolvency of the principal, be given in writing. Where in an action on a promissory note, the jury returned a verdict as follows: "We, the jury, find for the plaintiff, for the note and interest;" and where the court referred the cause to the clerk to assess the damages, who reported the same to the court, and thereupon judgment was rendered against the defendant by the court for the amount so reported by the clerk, with costs; *Held*, 1. That the intention of the jury was sufficiently indicated by the language of the verdict; 2. That the action of the court in referring the assessment of damages to the clerk, was nothing more than reducing the verdict to proper form.

Appeal from the Polk District Court.

WEDNESDAY, OCTOBER 13.

Action on a promissory note for \$330,00, of which the plaintiff was the assignee. The defendant, Wright, answered, averring payment of the note, except thirty or forty dollars. The other defendant, Campbell, answered, alleging that he signed said note as security for Wright, which fact was well known to said plaintiff; that the execution and indorsement of said note, was to enable the said Wright to borrow a certain sum of money, at about three and a half per cent. per month, in avoidance of the usury laws; that said Campbell, five or six months ago, when said Wright was solvent, notified said plaintiff to enforce collection of said note immediately, or he (said Campbell), would not pay the same, or any part thereof; that after the giving of said note to said plaintiff, he again called on said plaintiff, about three months since, and inquired of him whether said note had been collected; that he was then informed by said plaintiff, that said note was settled up satisfactorily; and that the money loaned on said note was only about three hundred dollars. Both an-

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swers were sworn to, and required the plaintiff to reply under oath.

The plaintiff filed separate replications. The reply to the answer of Wright denied the payment as alleged; admitted payment of a portion of the interest; and averred that the principal of said note was still due him from the defendants. This replication was sworn to by one James C. Savery, who states in his affidavit, that he has for a long time had charge of the business and office of the plaintiff, and is possessed of equal information with the party himself, in relation to the payment of interest upon the note in suit; and that he had had personal conversations with the defendants, and from Wright's own statements, in the office of the plaintiff, knows the allegations in the replication to be true.

The reply to the answer of Campbell was sworn to by the plaintiff, and alleged that the plaintiff had not sufficient knowledge or information to form a belief as to whether the said Campbell signed the said note as security for said Wright, and for that reason cannot admit or deny the said allegation; that he denied that plaintiff had any knowledge that said Campbell signed said note as security; that he had no sufficient knowledge, information or belief, as to whether or not the execution and indorsement of said note was to enable the said Wright to borrow a certain sum of money, at about three and a half per cent. per month, in avoidance of the usury laws, and he cannot, therefore, specifically admit or deny the said allegation; that he purchased the said note before the same became due; that the plaintiff admits that about six months ago said Campbell called upon the plaintiff, and verbally requested him to sue said Wright, as alleged in the answer; that this plaintiff then told said defendant, that he and said Wright were joint makers of said note, and if he wanted Wright sued, he could take up the note and sue him himself, which said Campbell declined to do; that the plaintiff has no knowledge as to the solvency of the said Wright; that he denies that after the giving of said note,

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the said Campbell called on this plaintiff, and inquired if said note had been settled, and was then informed that said note was settled up satisfactorily; and that he denies that the said note has been paid.

The replication of the plaintiff to the answer of Campbell, was filed at the June term, 1857. At the October term, 1857, a subpoena for the said plaintiff, requiring him to appear and testify at that term, on the part of the defendant, having been previously issued, and returned "not found" as to the said plaintiff, the defendant applied for a continuance of the cause, on account of the absence of the said plaintiff. As a ground for the application, the defendant filed his affidavit, alleging that he expected to be able to prove by said witness, the matters alleged in his said answer, setting them out; that he knew of no other witness by whom he could prove the same facts; and that the application was not made for delay, but to obtain justice.

The application for a continuance having been overruled, the parties proceeded to trial. The plaintiff offered in evidence a note signed by the defendants, to which the defendants objected, on the ground that the copy of the note appended to the petition, purported to be signed only by said Wright. The plaintiff asked leave to amend the petition, so far as to affix the name of the defendant, Campbell, to the copy of the note, in order that the same might correspond with the one offered in evidence, in support of which application, J. M. Ellwood, one of the attorneys, stated professionally that he had seen the name of the said Campbell on said copy of said note. The court being of opinion that the name of the defendant had been worn off the said copy of the note, by the frequent handling of the papers, permitted the amendment to be made, and thereupon allowed the said, original note to be offered in evidence, to which ruling the defendant excepted.

The defendant offered himself as a witness, after showing that a subpoena had been issued for the plaintiff, and returned not served. The plaintiff objected, which objec-

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tion was sustained, and the defendant was not permitted to testify, to which ruling he excepted. The defendant asked the court to instruct the jury as follows:

I. That if the jury shall find from the pleadings and evidence, that the said Campbell signed said note as security only, and that the said Stevens had notice of the same from Campbell, or otherwise, and that the said Stevens still held said note, and refused to secure the same of said Wright, and that the said Wright was solvent at that time, then the said Campbell is not chargeable for the amount of said note.

II. That if the jury shall find that the said Campbell was only security for the payment of said money, and that the same was known to the said Stevens; and that said Stevens was notified by Campbell to secure the same of Wright, or that he (Campbell) would not be holden, then if said Stevens offered to suffer said Campbell to pay off the said note, it was not such an act on the part of said Stevens as to save his right of action against Campbell, in case of the insolvency thereafter of the principal in said note.

These instructions the court offered to give, with an addition, as follows: "Provided that the notice was in writing," which amendment was objected to by the defendant, and the instructions were refused.

The jury having returned a verdict for the plaintiff, as follows: "We, the jury, find for the plaintiff, for the note and interest," the court referred the cause to the clerk, for the assessment of damages, who having reported the same at \$405,90, judgment was rendered against the defendants for that amount, with costs. A motion for a new trial was overruled, and the defendant, Campbell, appeals. The errors assigned, embrace the rulings of the court above set forth.

Bates & Phillips, for the appellant.

J. M. Ellwood, for the appellee.

STOCKTON, J.—The application for a continuance was properly overruled. The matters in dispute between the plaintiff and the defendant, Campbell, had been fully set forth in Campbell's answer, and the plaintiff had been required to reply thereto under oath. His replication setting forth his knowledge, information and belief, was duly filed, and defendant was entitled to use it upon the trial. If deemed inexplicit, or insufficient, the defendant should have applied to the court to have the same made more full and complete. But having called for a replication to be given under oath, after the same was duly given, the defendant was not entitled to a continuance, in order to procure the attendance of the plaintiff as a witness, to testify concerning the same matters already embraced in his sworn replication. The affidavit for a continuance, does not allege any other matter expected to be established by plaintiff's testimony, if present and examined as a witness, than such as he had already stated on oath, all his knowledge and belief concerning.

As it was shown to the court that the copy of the note sued on, attached to the petition, contained, when first filed, the name of the defendant, Campbell, and that the said name had become defaced and illegible by frequent handling of the papers, there was no impropriety in the permission given by the court to the plaintiff, to amend the copy upon the trial, so as to make it conform to the original.

The court correctly refused to permit the defendant, Campbell, to be sworn as a witness. If the *subpoena* issued had been duly served upon the plaintiff, and he had failed to appear and give testimony, it might be worth while to inquire, whether the writ itself was such an one, as to entitle the defendant, upon the failure of the plaintiff to obey it, to a continuance, or to be sworn himself as a witness, or to have his pleading ordered to be taken as true. As the writ issued, however, was not served on the plaintiff, there can be no pretence that the defendant was en-

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titled to the relief he might have claimed under sections 2421 and 2422 of the Code, provided plaintiff had been duly *subpœnaed*, and had failed to appear and give his testimony.

Since the taking effect of the Code, the notice required to be given by the surety to the holder of a promissory note, to proceed by suit against the principal, must, in order to release the surety from liability, in case of the subsequent insolvency of the principal, be given in writing. Code, section 970.

The cause having been submitted to the jury, they returned a verdict as follows: "We, the jury, find for the plaintiff, for the note and interest." The court then directed the clerk to assess the plaintiff's damages, and the clerk having reported the amount to the court, judgment was rendered in favor of the plaintiff for \$405,90. It is objected by the defendant, that the verdict of the jury was such that no judgment should have been rendered upon it; that it was error to direct the clerk to assess the plaintiff's damages, or to render judgment on such assessment; and that the damages should have been ascertained by the verdict of the jury. It is provided by the Code, (section 1788), that where the action is for the recovery of money only, the jury shall assess the amount of the recovery. But the verdict is sufficient in form, if it expresses the intention of the jury; and it may be put in proper form by the court, if necessary. Sections 1789 and 1790. In this instance, we regard the action of the court, as nothing more than reducing the verdict of the jury to proper form. It would have been more strictly regular, for the court to have directed the jury to ascertain, in dollars and cents, the amount of the damages. But their intention is sufficiently indicated by the language of the verdict. *McGregor, Lawes & Blakemore v. Armill*, 2 Iowa, 30. When there is a judgment by default in favor of the plaintiff, if the action is for a money demand, and the amount of the proper judgment is a mere matter of computation, the clerk may assess the damages. Section 1828.

SUPREME COURT CASES—1858.

Phillips v. Shelton.

The jury in this case had determined the material question at issue between the parties, in favor of the plaintiff, "that he ought to recover his damages;" and upon the verdict as it stands, even according to the strictness of the common law, the plaintiff was entitled to an interlocutory judgment of "*quod recuperet*." The only question then would be, whether the court should have impaneled another jury to inquire of the damages. Ordinarily, where there is an issue of fact tried by a jury, the jury, at the same time that they try the issue, assess the damages. Stephens on Pleading, 139. But we think the interlocutory judgment to which the plaintiff was entitled, upon the verdict as it stood, was at least of equal validity with a judgment by default, as provided by the Code; and that it might well direct the damages to be assessed by the clerk, and award final judgment for the amount so ascertained.

Judgment affirmed.

PHILLIPS v. SHELTON.

A party has no right of appeal from the district to the supreme court, until some question to which he was a party has been adjudicated by the district court.

Where in an action for the specific performance of a contract to convey real estate, one S. filed a statement that he was a creditor of the respondent, and had attached the land claimed by complainant, which statement was not sworn to; and where there was nothing in the transcript to show that S. was made a party to the suit, or that any steps were taken by him further than to file said statement, except to appeal from the decree rendered in favor of complainant; *Held*, That the appeal must be dismissed.

Appeal from the Polk District Court.

WEDNESDAY, OCTOBER 13.

SPECIFIC PERFORMANCE. In the district court, one Smith

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filed a statement that he was a creditor of the respondent, and had attached the land claimed by complainant. This statement was not sworn to. There is nothing to show that Smith was made a party, nor that any steps were taken by him, farther than to file said statement. Decree for complainant, and Smith appeals.

Williamson & Nourse, for the appellant.

Brown & Ellwood, for the appellees.

WRIGHT, C. J.—This appeal must be dismissed. Smith was never made a party to the proceedings in the court below, nor is there sufficient to show, that he has any such interest in the litigation as entitles him to be heard in this court. If the district court had determined that he could not be made a party, he might have asked us to re-examine that question. But until some question has been adjudicated, to which he was a party, he has no right to appeal. His remedy, if any he has, lies in another direction.

Appeal dismissed, and judgment affirmed.

THE CITY OF MOUNT PLEASANT v. CLUTCH.

The fourteenth section of the act entitled "An act to incorporate the city of Mount Pleasant," approved July 15, 1856, which invests the city council with authority, among other things, to make ordinances "to license, tax and regulate auctioneers, transcient merchants, hawkers, pedlars and pawn-brokers," is not unconstitutional and void.

Appeal from the Henry District Court.

WEDNESDAY, OCTOBER 13.

This suit was brought by the city of Mount Pleasant, to recover of the defendant the amount of the tax imposed upon him by the ordinance of the city, in the shape of a

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penalty for exercising the business of a transient merchant in the city of Mount Pleasant, without having paid the tax imposed upon him by the ordinances of the city. The cause was first tried before a justice of the peace, and taken by appeal to the district court. The district court decided that the provision of the "Act to incorporate the city of Mount Pleasant," approved July 15, 1856, authorizing a tax or penalty on "transient merchants," as such, was unconstitutional and void, and dismissed the proceeding, from which decision the plaintiff appeals.

Ambler & Woolson, for the appellant.

No appearance for the appellee.

STOCKTON, J.—By the fourteenth section of the charter, the city is invested with authority, among other things, "to license, tax and regulate auctioneers, transient merchants, hawkers, pedlars, and pawn-brokers." This is the portion of the act which the court held to be unconstitutional and void, on the ground that it imposed a penalty on "transient merchants," as such, and gave exclusive privileges to citizens within the corporation to do business, which other citizens temporarily residing in the city are prohibited from doing. A slight examination of the section of the act referred to, will, we think, sufficiently show that the district court was mistaken in the meaning given to it; and that the construction placed upon it, was wholly unauthorized. The legislature may undoubtedly confer upon the city council the power to tax "transient merchants," doing business in the city; and the act, for that purpose, so far from being regarded as an attempt to confer exclusive privileges upon one class of citizens, should rather be viewed as an attempt to equalize taxation, and to require all to contribute to the support of the city government.

Judgment reversed.

Gammell v. Potter.

GAMMELL v. POTTER.

Under the act entitled "An act authorizing mill dams," approved January 24, 1855, certain facts are to be ascertained by the jury; and when ascertained and reported to the court, their finding or verdict must be deemed as conclusive upon the matters submitted to them, as the verdict of a jury in any other case.

Until the verdict of a jury summoned under the act authorizing mill dams is set aside, their ascertainment of damages must be considered conclusive; and if the applicant elects to pay the damages, he is entitled to a license for the erection of the dam, if it is further ascertained by the jury, that no dwelling house, &c., will be overflowed, or injuriously affected by it, and if it further appears to the court that the same is reasonable, and for the public benefit.

In answer to a writ of *scire facias*, issued under the fifth section of the act authorizing mill dams, approved January 24, 1855, requiring the party to appear and show cause, &c., a defendant cannot assign as cause against the granting of the license to erect a dam, matters legitimately involved in the question of damages submitted to the jury, and pertinent only on an application to set aside the finding of the jury, and award a new inquiry of damages.

In answer to a writ of *scire facias*, the defendant may allege and prove, as sufficient cause why a license for the erection of a mill dam should not be granted by the court, facts which tend to show that the same would be unreasonable, or that the dam, if built, would not be for the public benefit.

In proceedings under the act entitled "An act authorizing mill dams," approved January 24, 1855, matters that are intended to show improper interference by the plaintiff with the jury, and mistake or misconduct on the part of the jury themselves, in ascertaining the damages, do not amount to the sufficient cause contemplated by section five of the statute, why leave should not be granted to build the dam, but come more properly before the court, on an application to set aside the inquisition, and award a new writ of *ad quod damnum*.

The statute authorizing mill dams, approved January 24, 1855, has made provision for compensating a party in money, for all loss, trouble or inconvenience resulting to him from the erection of a mill dam; and if his damages have not been properly assessed by the jury, he must either make the objection on an application to the court to set aside the verdict and award a new inquiry, or he must rely for redress on that provision of the statute, which reserves to him his right of action against the applicant, for any loss or damage to him from the dam, not actually foreseen by the jury, and estimated by them on the inquest.

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Appeal from the Jackson District Court.

FRIDAY, OCTOBER 15.

This cause was before this court at a former term, on appeal from the judgment of the district court dismissing the petition, and quashing the writ of *ad quod damnum*, and all the proceedings under it. See 2 Iowa, 562.

On the return of the cause to the district court, the defendant filed a demurrer to the petition, which was overruled. He then, in answer to a writ of *scire facias*, assigned certain matters as cause why leave should not be granted for the erection of the dam. These matters he asked leave to prove and show to the court; and if proved true, he prayed that the inquisition of the jury might be set aside, and the license asked refused. To this assignment, and to the leave asked by defendant to prove the same to the court, the plaintiff demurred. The district court overruled the demurrer, and plaintiff appeals.

D. F. Spurr,¹ for the appellant.

John B. Booth, for the appellee.

STOCKTON, J.—The question for our decision is, whether the demurrer was rightly overruled. Under the statute, the jury are to assess the damages of each proprietor to be affected by the erection of the dam, and are to ascertain and report whether any dwelling-house, out-house, orchard or garden will be overflowed or otherwise injuriously affected by it. On the return of the inquisition, a writ of *scire facias* issues to the parties interested, to appear and show cause why leave shall not be granted to build the dam; and if it appears to the court that no dwelling-house, out-house, orchard or garden, will be overflowed, or injuriously affected, and if the court shall judge it reasonable, and for the public benefit, license shall be granted for the

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erection of the dam, on the applicant paying the damages assessed by the jury and decreed by the court. Act of January 24th, 1855; Session Acts, Ch. 92.

The question at once arises, what matters may be shown as cause against the granting of the license; and whether the matters alleged by the present defendant may be shown; and whether, if proved, they amount to sufficient cause against the erection of the dam, within the true intent and meaning of the act. If it appears to the court from the inquisition of the jury, that the dwelling, out-house, orchard or garden of any proprietor will be overflowed, or injuriously affected by the dam, the license for its erection must be refused. All questions in relation to the same, are to be decided by the jury. The court is, however, further to determine, whether it is reasonable and for the benefit of the public, that the dam shall be erected; if not so determined, the license is to be refused. Certain facts are to be ascertained by the jury; and when ascertained and reported to the court, their finding or verdict, must be deemed as conclusive upon the matters submitted to them, as the verdict of a jury in any other case. As the jury are not, however, required to report whether the granting of the license would be reasonable, nor whether the erection of the dam would be for the benefit of the public, the court must, in some method, inquire and ascertain these facts for itself.

We see nothing improper or inappropriate in permitting a defendant, in answer to a writ of *scire facias*, to allege and prove as sufficient cause why a license should not be granted by the court, facts which tend to show that the same would be unreasonable, or that the dam, if built, would not be for the public benefit. He cannot, however, assign as cause against the granting of the license, matters legitimately involved in the question of damages submitted to the jury, and pertinent only on application to set aside the finding of the jury, and award a new inquiry of damages. Until set aside, their ascertainment of damages must be considered conclusive; and if the applicant elects

to pay the damages, he is entitled to a license for the erection of the dam, if it is further ascertained by the jury, that no dwelling-house, &c., will be overflowed, or injuriously affected by it, and if it further appears to the court that the same is reasonable, and for the public benefit.

The defendant assigned as cause why the license ought not to be granted :

I. That the jury were directed by the plaintiff as to the location and elevation of the dam, and as to the quantity of land proposed to be overflowed by it.

II. That the jury did not take the level of the stream, nor cause a survey of the land that would be overflowed by it.

III. That the erection of the dam will cause to be flooded a greater quantity of land than is proposed by the plaintiff in his petition ; to-wit, forty acres, instead of twenty.

IV. That it will cause to be overflowed a part of the orchard of the defendant ; that the water will be brought within one foot of the door of his stable ; and that it will destroy defendant's spring of water, being the only one to which he has access for the use of his family.

V. That defendant will be compelled to build a bridge twenty-five rods long, in order to have access to his land not flooded, and used by him for farming purposes, and to remove seventy rods of standing fence.

The matters alleged under the first and second heads, as they are intended to show improper interference by the plaintiff with the jury, and mistake or misconduct on the part of the jury themselves, in ascertaining the damages, would come more appropriately before the court, on an application to set aside the inquisition and award a new writ of *ad quod damnum*. They do not amount to the sufficient cause contemplated by the statute, why leave should not be granted to build the dam. At this stage of the cause, the court was bound to consider them, in reference to the verdict of the jury, *omnia vite esso acta*.

In reference to the remaining objections, we must say

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that we think the law has made provision for compensating the party in money for all loss, trouble or inconvenience resulting to him from the building of the dam ; for these his damages are to be assessed by the jury. If the jury have estimated for only twenty acres of land, when the defendant can show that forty acres will be overflowed ; if his out-houses and orchard will be injuriously affected by the dam, and the jury have ascertained and reported that they will not be overflowed or affected by it ; if the jury have not estimated for the loss and inconvenience to result from building bridges and removing fences, the defendant must either make these objections on an application to the court to set aside the verdict and award a new inquiry, or he must rely for his redress on that provision of the statute which reserves to him his right of action against the applicant, for any loss or damage resulting to him from the dam, not actually foreseen by the jury, and estimated by them on the inquest. Section 8, 153.

In answer to the rule upon him to show cause why leave shall not be granted to build the dam, the defendant cannot for cause, assign matters which must be considered estimated for, and settled by the verdict of the jury. To adopt such a practice, would be to re-open for litigation before the court, questions intended to be disposed of by the inquisition. As the matters alleged by the defendant against the granting of the license to build the dam, do not, in our opinion, amount to the cause required by the statute to be shown against it, the demurrer interposed by plaintiff should have been sustained by the court, and the answer of defendant to the *scire facias* quashed. The judgment will therefore be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

Speers v. Fortner.

SPEERS v. FORTNER.

It is not error to expunge from an answer, matter of which a part is scandalous, and all is redundant and irrelevant.

Where it is assigned as error, that the court permitted a witness to testify who was incompetent, the record should disclose the substance of the testimony given by the witness, or that it was material.

A judgment will not be reversed, unless it is made apparent to the appellate court, that a new trial is necessary in order to correct some injury resulting from the judgment appealed from.

Where it does not appear with reasonable certainty, that the party complaining would be placed in a better condition, by giving him another trial, a new trial should not be granted.

The supreme court will not presume a state of facts in order to find error, but every presumption is in favor of the ruling in the court below.

Where in an action commenced by attachment, the plaintiff, on the trial, offered as a witness one of his sureties on the attachment bond, who was objected to by the defendant, on the ground of interest, but the objection was overruled, and the witness allowed to testify; and where the record did not disclose the testimony given by the witness, nor show that it was material; *Held*, That it did not appear from the record, that the appellant was prejudiced by the admission of the witness.

Appeal from the Mahaska District Court.

FRIDAY, OCTOBER 15.

ACTION FOR DAMAGES. Plaintiff moved to expunge from the answer of the defendant, certain paragraphs upon the ground that they were redundant and scandalous. This motion was sustained, and defendant excepted. An attachment was asked and issued at the commencement of the suit. One Rogers, who was a security upon the attachment bond, was offered as a witness on the part of the plaintiff, and objected to by the defendant, on the ground of interest. The objection was overruled, and he was admitted to testify; but what he stated, or whether his testimony was material, does not appear. Trial, verdict and judgment for plaintiff, and defendant appeals.

Crookham & Fisher, for the appellant.

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E. W. Eastman and *W. H. & J. A. Seevers*, for the appellee.

WRIGHT, C. J.—There was no error in sustaining the motion to expunge. A portion of the matter so expunged is liable to the charge of being scandalous, and all of it is redundant and irrelevant. Not only so, but so much of the answer as remained, presented fully and completely every issue of fact, contained, or attempted to be set up, in the matter expunged. Defendant was, therefore, in no manner prejudiced by this ruling.

Did the court err in overruling the objection to the witness, Rogers? Appellees insist that the witness was competent; but that, if he was not, it does not appear what his testimony was, or that it was material; and that, until this does appear, the question of his competency is entirely immaterial.

In *Mays v. Deaver*, 1 Iowa, 216, it was held not to be sufficient to show that an improper question was asked the witness, but that it must also appear that the answer thereto disclosed improper and illegal testimony, prejudicial to the party objecting. This ruling was placed upon the plain and familiar rule, that error will not be presumed by this court—that it must be disclosed by the record—and that a state of facts will not be presumed, in order to find error. We there refer to the case of *Samuel v. Withers*, 9 Miss., 166, in which it is expressly held, that even if an incompetent witness is admitted, it must appear that he gave evidence material to the case, or the judgment will not be reversed. And this, we believe to be the correct rule. We think the record should disclose, either the substance of the testimony given, or that it was material. A case should not be reversed, unless this court can see that a new trial is necessary in order to correct some injury resulting from the judgment appealed from. If it does not appear with reasonable certainty, that the party complaining could be placed in a better condition by giving him

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another trial, it should not be granted. And hence, in this case, suppose for this alleged error, the cause should be remanded, and this witness excluded. Now, for aught that appears, he was virtually excluded before; for it is not shown that he testified to anything, and least of all, anything that influenced the finding of the jury. If he did not, then his exclusion would affect nothing, and a second trial would result as did the first. Not only so, but granting him to be interested, and that he did give testimony, it would by no means follow that it should be excluded. There are some matters as to which a party may testify; and of these, as well as others, perhaps, a witness standing disqualified for most purposes, upon the ground of interest, may speak.

In *Lawson v. Campbell & Bros.*, 4 G. Greene, 413, it was said that this court will not presume a state of facts in order to find error, but every presumption will be in favor of the ruling in the court below. Under this rule, we do not know but this witness may have testified of those things, about which he might speak, though incompetent for most or all other purposes; and this presumption that the court acted correctly, not being rebutted by anything shown by the record, we cannot say there was error.

It is suggested by appellants, that there was error in certain instruction given by the court. No objection was made or exception taken to them, however, and we cannot, therefore, inquire into their correctness.

Judgment affirmed.

INDEX.

ABATEMENT.

1. Where a former suit on the same cause of action is dismissed, after the defendant pleads such former suit in abatement, the plea should be sustained. *Rawson v. Guiberson*, 507.

2. Where it does not appear from the pleadings or evidence, in a cause in which the defendant pleads in abatement a former action pending, whether the former suit was dismissed *before* or *after* the filing of the plea, and where it appears from the record that the court below sustained the plea in abatement, it will be presumed that the former action was not dismissed until after the plea was pleaded. *Ib.*

3. Where in an action the defendant pleaded in abatement another action pending in the Warren district court, upon the same promises set forth in the petition, to which the plaintiffs replied, averring *that since the commencement of the present action*, the said plaintiffs had dismissed the suit in defendant's plea mentioned, to which there was no rejoinder; and where it appeared from the record, that the cause was submitted to the court upon the issues, and that it was ordered that the plea in abatement be sustained, and the suit dismissed; *Held*, That there was no error in the decision of the district court. *Ib.*

ACCOUNT.

1. Where on the trial of a cause, the plaintiff produced a small book, containing the account on which suit was brought, in which were charges against the defendants and other persons, which account among other things, charged the defendants with a certain quantity of stone; and where the plaintiff testified that the charges in said book against the defendants, were not made at or near the time of the transaction, for the reason that he was not present when the defendants were getting the stone; that the defendants told him, after they had finished getting the stone, the amount, which he then entered as appeared in said book; that this was his book of original entries; and that the charges therein made were true; and where the defendants objected to the introduction of the book in evidence: 1. Because the same was not a book of accounts within the meaning of the Code; and 2. Because the entries were not proper evidence, on account of the manner of making them, which objections were overruled, and the book admitted in evidence; *Held*, 1. That the book, so far as it related to the stone, was properly admitted in evidence; 2. That as to the other items of the account, the book should have been rejected; 3. That the showing of the plaintiff brought the book within the reason and spirit of the statute. *Anderson v. Ames & Co.*, 486.

ACTION.

1. The word "hereafter," in section 1672 of the Code, in relation to the time of commencing an action, has reference to the time when the Code took effect, and not to the time of its passage. *Bennett v. Bevard*, 82.

2. Where it appeared that the plaintiff, as the agent of C, sold to the defendants a threshing machine, who gave to the plaintiff their note for the balance due; that plaintiff had for sale two classes of machines, one selling for \$195 and the other for \$315, which prices were shown by bills posted up in plaintiff's store, and to which defendants were referred at the time they inquired for the price; that they undertook to pay \$195 for a machine, and a bill of sale was executed, which, in its terms, described a machine of the higher value; that defendants received one of the higher class, and within a short time were advised of the mistake, and plaintiff offered to take back the machine; and that one of the defendants (the other not being present), stated that their engagements to thresh were such, that they could not return it, but that he would see his brother, (the other defendant), and make it right; *Held*, That the action was properly brought in the name of the plaintiff, and that he could recover. *Fear v. Jones*, 350.

3. Where there is an agreement between the parties to a written contract, for a consideration, to extend the time of payment to a given period, an action upon the written contract cannot be sustained, if brought before the expiration of the time for which the payment was extended. *Cox & Shelley v. Carroll & Co.*, 350.

ACTION OF RIGHT.

1. In an action to recover the possession of real property, brought by the person holding the legal title, an equitable title is no defence against the legal one. *Page v. Cole*, 153.

2. A vendor of real estate, when the purchase money remains unpaid, is not compelled to pursue the course indicated in sections 2068, 2094, and 2095 of the Code. Those sections do not take away his other rights; they only provide for certain matters, in case he resorts to that remedy. *Ib.*

3. Where in an action of right to recover the possession of certain real estate, the defendant answered, admitting that on the first day of May, 1856, the plaintiff was the owner in fee simple of the said premises, and averring that on that date he entered into a written agreement with defendant, to convey the premises to him for the consideration of \$2,000, to be paid as follows: \$500 by the conveyance by defendant to plaintiff of a certain tract of land in Johnson county, consisting of eighty acres, which was then conveyed; and the balance in one, two, and three years from date, for which three promissory notes, of \$500 each, were executed to plaintiff, all which notes are not yet due; and that defendant took possession of the premises, with the consent of the plaintiff—to which answer was appended a copy of the contract, from which it appears that the notes were to draw ten per cent. interest, payable semi-annually, and that upon payment in full of said notes, the deed was to be executed and delivered; and where the plaintiff replied, admitting that defendant went into possession with the consent of plaintiff, and averring that the written obligation contained the entire contract; that the defendant had not paid either of the said notes, one of which became due on the first of May, 1857, (after which date this action was commenced), nor the semi-annual interest which had become due on all the notes—and that the above sums having become due, and being unpaid, on the 29th of November, 1856, the plaintiff gave the defendant written notice to quit the premises on the first day of March, 1857, which he refused to do—to all which replication, except the first count, the defendant demurred, for the following reasons: 1. That said replication showed that the plaintiff had received the consideration for the property, and still retains the same; 2. That the replication does not show that plaintiff has tendered to defendant the promissory notes, and the amount

paid upon the contract; 3. That that part of the replication which avers notice to quit the possession, is in the nature of an amendment to the petition, and the addition of a new cause of action; and 4. That said replication shows no substantial cause of defence—which demurrer was sustained by the court; *Held*, That the court erred in sustaining the demurrer. *Ib.*

4. A party who receives title to real estate after the rendition of a judgment in an action of right, against his grantee, is not an innocent purchaser, without notice, and the plaintiff in the judgment is entitled to revive it, and have execution against such party. *Von Puhl et al. v. Rucker et al.*, 187.

5. In an action of right, the judgment is notice to all persons of the right of possession, as between the plaintiff and defendant. *Ib.*

6. In an action of right, the plaintiff, where he holds the legal title and right of possession to real estate, may recover for the use and occupation of the land, as well as the title and possession. *Dunn v. Starkweather*, 466.

ADMINISTRATOR.

1. An administrator of a deceased husband cannot maintain an action of replevin against the vendee of the widow, or those claiming under her, for the recovery of property of the husband, left with the widow, as the head of the family, and exempt from administration, or as belonging to her distributive share of her husband's estate, after the payment of debts. *Wilmington, Adm'r v. Sutton*, 44.

2. In neither case has the administrator of the husband, a shadow of right to the property. *Ib.*

3. F. was the administrator of the estate of L., deceased, and also the guardian of his minor children, six in number. Upon a settlement of his accounts before the county court, there was found to be due F., from the said estate, the sum of \$26,40, for which a judgment was rendered in his favor by the county court, and there was found to be in his hands, of the estate of his wards, and due to them, a certain sum to each. From the decision of the county court, upon the accounts of F., as administrator and guardian, the heirs appealed to the district court, in which the accounts were referred to a commissioner, to restate the same, and report to said court. The commissioner reported that there was due to F., as administrator, from the estate, \$10,68, and that a certain sum was due to each heir, on the 20th of September, 1855, from said F., making a total of \$1766,51. Both parties excepted to the report of the commissioner, but they were overruled. The district court confirmed the report, ordered interest to be allowed on the amount reported to be due to the heirs from F., from the date of the filing of the report to the time of its acceptance by the court; and, adding the several amounts together, including the sum due one of the heirs, who had deceased, rendered judgment against F., in favor of "The Heirs of L.," for \$2,079,15. *Held*, 1. That the accounts of F., as administrator, and as guardian, could not be treated as a whole, and that they could not be taken to the district court, nor brought to the supreme court, by one and the same proceeding, in the nature of an appeal; 2. That no judgment could be properly rendered in favor of the heirs, by the name of "The Heirs of L.;" 3. That in such a proceeding neither the county court, nor the district court, was authorized to render a judgment against F., either as guardian, or as administrator. *Foteaux v. Lepage et al.*, 128.

4. Where the same person is administrator of an estate, and also guardian of the minor heirs of the intestate, his account as administra-

tor is distinct from his account as guardian; and his account as guardian of each one of the heirs, is distinct from that of all the others. The county court is required to consider each account separately, and to render a distinct adjudication upon each; and it is from such decision that an appeal must be taken, and not one appeal from the whole. *Ib.*

5. A proceeding before the county court, to require an administrator or guardian, to make a settlement of his account, and to ascertain the situation of the estate of which he is administrator or guardian, is in no sense a proceeding to recover a judgment against the administrator or guardian, for the money received by him, or remaining in his hand. *Ib.*

6. In such case, neither the county court, nor the district court, is authorized to render any judgment against the party. All that it is empowered to do, is to ascertain the state of the accounts, as such administrator or guardian, in order that, when so ascertained, the parties interested may take such further steps as they may deem expedient. *Ib.*

7. An administrator has no right to receive the rents and profits of the real estate of his intestate, accruing after his decease. *Ib.*

8. The accounts of an administrator or guardian should be rendered under oath. *Ib.*

9. In proceedings against an administrator or executor, to prove up a claim against an estate, no judgment—in the sense in which the term is ordinarily used—should be rendered. *Voorhies & Co. v. Eubank, Ex., 274.*

10. The object of the proceeding is to ascertain the truth and justice of the claim made against the estate; and when so ascertained, it is to be allowed, and ordered to be paid from the assets of the estate. *Ib.*

11. In proceedings to prove up a claim against an estate, the executor or administrator, and not the estate, should be made party defendant. No judgment or adjudication can be rendered against the estate as defendant, as against a natural person. *Ib.*

12. Where a judgment is rendered against an executor or administrator, it should be against him in his official capacity, to be levied of the goods and chattels of the deceased, in his hands to be administered. *Ib.*

13. In proceedings against an executor or administrator, to prove up a claim against an estate, no order should be entered for the issuing of an execution. *Ib.*

AMENDMENT.

1. It is error to refuse leave to plaintiff in a suit commenced by attachment, to amend his affidavit for the writ, or to quash the attachment, on the ground of a defect in the affidavit, which is the result of oversight, and which the plaintiff asks leave to amend. *Bunn v. Prichard, 56.*

2. Where an attachment was sued out, on the ground that the defendant had property, goods, &c., not exempt from execution, which he refused to give either in payment or security of the debt, and the word "not," between "goods, &c.," and "exempt," was omitted by oversight; and where the court dissolved the attachment, on account of the defect in the affidavit, although the plaintiff asked leave to file an amended affidavit, as soon as the defect was discovered, which leave was refused; *Held*, That the court erred in refusing the plaintiff leave to amend the affidavit, and in quashing the attachment. *Ib.*

3. While there is no provision of the Code, expressly giving the power to order the substitution of the true name of a party, when ascertain-

ed, yet it is entirely competent for the court to so direct, under the numerous and liberal provisions which give the right to amend pleadings, or any paper in a case. *Arbuckle v. Bowman et al*, 70.

4. Where in an action on a joint promissory note, the plaintiff offered in evidence a note signed by the defendants, to the introduction of which they objected, on the ground that the copy of the note appended to the petition was signed by one of the defendants only; and where the plaintiff asked leave to amend the petition, so far as to affix the name of the other defendant to the copy of the note, in support of which application, one of the attorneys stated professionally, that he had seen the name of the said defendant on the said copy of said note; and where the court being of the opinion that the name of said defendant had been worn off the said copy of said note, by the frequent handling of the papers, permitted the amendment to be made, and admitted the original note in evidence; *Held*, That the proceeding was not erroneous. *Stephens v. Campbell*, 588.

ANSWER.

1. An answer to a petition on a promissory note, which "denies that the defendant is indebted to the plaintiff in the sum named in the petition, or in any less sum, and that the defendant made and executed the note described in said petition, as therein alleged," is sufficient to put in issue the execution of the note sued on, in the same manner as the plea of *non est factum* would have done, in an action of debt under the old system of pleading; and such allegations in an answer, are not irrelevant and redundant. *Lyon v. Bunn*, 48.

2. In order to make an issue as to the execution of an instrument on which suit is brought, the first section of the act entitled "Act act relating to evidence," approved January 24, 1858, does not require that the answer of the defendant, denying its execution, should be sworn to. *Ib*.

3. And such an answer sufficiently denies specifically, every material affirmative allegation of the petition, is directly responsive to the petition, and presents an issue of fact for trial. *Ib*.

4. Where in an action on a promissory note, one of the makers answered denying the execution of the note, and averring full payment, to which answer no replication was filed; and where the cause was tried by the court, without a jury, and it appeared from the transcript, that the cause was tried upon the issues joined, and a judgment rendered for the plaintiff; and where it was claimed in the appellate court, that the answer being undenied, the judgment should have been for the defendant, but it did not appear from the transcript, that the defendant had claimed in the court below, that his answer had been admitted, or was to be taken as true; *Held*, 1. That whether the answer contained any affirmative allegation, which required a denial under section 1742 of the Code, *quare*? 2. That under the circumstances of the case, the objection had no weight at that stage of the proceedings. *Arbuckle v. Bowman et al*, 70.

5. Where a sworn answer in chancery sets up matter not responsive to the bill, the new matter is not to be taken as true. *Schaffner et al v. Grutzmacher et al*, 187.

6. Where in an action of trespass, for taking personal property, the defendants filed a joint answer, denying the allegations of the petition; and where, at a subsequent term, without any leave to amend their answer, or to file a new answer, being granted, one of the defendants filed a separate answer, admitting the taking, and justifying under a writ of attachment, and the other two defendants filed a joint further answer, justi-

lying under the other defendant, to which answer there was a replication; and where the court instructed the jury, that under the pleadings the trespass was admitted, and plaintiff need not prove it; and that plaintiff had a right to recover, unless the defendants had proved the matter of justification; *Held*, That the last answers were not intended as a waiver of the answer in denial, and that the court erred in giving the instruction. *Grash v. Sater et al.*, 301.

7. In chancery, the answer of the respondent, upon any matter stated in the bill, and responsive to it, is evidence in his favor; and is conclusively so, unless it is overcome by evidence which is equal to the satisfactory evidence of two witnesses. *The State, ex rel. The Attorney General v. Tilghman et al.*, 496.

8. Where the answer of the respondents to a bill in chancery, is responsive to the matters stated in the bill, and there is no proof to overcome the answer, it is to be taken as true, although a general replication may have been filed. *Ib.*

9. It is not error to expunge from an answer, matter, of which a part is scandalous, and all is redundant and irrelevant. *Speers v. Fortner*, 558.

APPEAL.

1. An appeal may be taken to the supreme court, from a judgment rendered by default, or a decree *pro confesso*. *Woodward v. Whitescarver et ux.*, 1.

2. The fact that an appeal was taken and allowed from a judgment rendered by a justice of the peace, more than ten days before the first term of the district court, after the appeal was taken, and that the justice failed to return the original papers, with a transcript of the entries on his docket, to the district court, until after said first term had elapsed, constitutes no ground for affirming the judgment of the justice, on motion of the appellee, at a subsequent term. *Holloway v. Baker*, 52.

3. The law does not affix, as a penalty on the appellant, for a failure of the justice to do his duty, that the judgment shall be affirmed. *Ib.*

4. Where a party convicted of a criminal offense, has a perfect, well defined, and complete remedy, in the regular and usual method of appeal, he is not entitled to a writ of *habeas corpus*. *Platt v. Harrison, Sheriff*, 79.

5. In an appeal from a justice of the peace, the appellee, on the third day of the term, moved for an affirmance of the judgment before the justice, under the sixty-ninth rule of practice in the first judicial district, which rule provides: "That on filing the papers of an appeal in civil suits, by a justice of the peace, with the clerk of the court, it shall be the duty of the clerk to endorse the time of filing, and docket the same, although the appellant may fail to pay the docket fee required by law; and should not such fee be paid or secured by noon of the second day of the term, the appellee, upon motion, shall have the judgment below affirmed, with costs," which motion was sustained, and the judgment affirmed. On the fifth day of the term, the appellant filed a motion to set aside the order of affirmance, and set down the cause for trial, which motion was supported by an affidavit, alleging that before the term of the court, the appellant was taken sick, and was confined to his bed until after the commencement of the term; that he was unable to attend to the payment or securing of said fees; that if he had been able to attend to the business, they would have been paid before the commencement of the term; and that he had a meritorious defense to the suit: which mo-

tion was overruled. At the time of the affirmance of the judgment, the attorney of the appellant was in court, and made no objection; *Held*, That there was no error in the decision of the court. *McManus v. Humes*, 159.

6. Chapter 251 of the laws of 1857, entitled "An act providing for appeals in criminal cases," does not confer the right to appeal from an order to punish for a contempt. *Dunham v. The State*, 245.

7. Chapter 251 of the laws of 1857, providing for appeals in criminal cases, refers to those cases in the same sense, and in the same manner, in which they are referred to in chapter 184 of the Code, and only changes the manner of bringing such cases to the appellate court. *Ib.*

8. After an executor or administrator has appeared before the county court, in proceedings to prove up a claim against the estate, and consented to a continuance, and the appointment of an auditor to audit the claim of the plaintiff, he cannot, on appeal to the district court, move to dismiss the suit for want of notice, as required by law. *Voorhies & Co. v. Eubank, Ex.*, 274.

9. Where on appeal from the county court, in proceedings to prove up a claim against an estate, the transcript shows that the executor or administrator, made an appearance, the defendant in the district court cannot be permitted to show, by affidavit, that he did not appear, and thus contradict the record of the court. *Ib.*

10. Upon the failure of an appellant to docket his case, and prosecute his appeal, in proceedings to prove up a claim against an estate, the district court may affirm the judgment of the court below, or may dismiss the appeal, leaving the judgment of the court below to stand. *Ib.*

11. Where the transcript of a case shows the appearance of the parties, the case will be presumed to have been properly heard, although the decree does not state in terms, whether it was heard upon the pleadings, or upon the pleadings and proofs; and this holds good even on appeal, to some extent. *Campbell v. Ayres*, 339.

12. Where a decree is technically defective only, on appeal, it will be corrected in the appellate court. *Ib.*

13. To give the district court jurisdiction on appeal from a justice of the peace, it must be shown, either that the appellee had the notice required by the statute, or that he made a voluntary appearance in the district court. *Quillan v. Windsor*, 396.

14. An appeal from a justice of the peace, whether allowed by the justice or the court, must be taken and perfected within twenty days from the rendition of the judgment. *McBrearty v. Dyer*, 528.

15. On appeal to the district court, where there has been a trial of the cause before the justice of the peace, a general denial of indebtedness will be presumed to have been made upon the trial, if nothing appears to the contrary upon the record. *Hall v. Denise*, 534.

16. Where in an application to the district court, for the allowance of an appeal from the decision of the county court, granting letters of administration to M., on the estate of R., made by the heirs of R., and others interested in his estate, it appeared that R. died in 1837, a non-resident of the State; that no administration was granted on his estate in this State, until May, 1855, when the defendant, M., applied for, and was appointed administrator; that the said heirs and others had no notice of the intention of M. to apply for letters; and that they had no knowledge of the grant of such letters, until after the expiration of the thirty days allowed for appeal, which application was made within sixty days from the appointment of M.; *Held*, That the petition showed good ground for

an appeal, as well as that the failure to take it in time, was without fault on the part of the petitioners. *Reynolds v. Miller*, 459.

17. A party has no right of appeal from the district to the supreme court, until some question to which he was a party has been adjudicated by the district court. *Phillips v. Shelton*, 545.

18. Where in an action for the specific performance of a contract to convey real estate, one S. filed a statement that he was a creditor of the respondent, and had attached the land claimed by complainant, which statement was not sworn to; and where there was nothing in the transcript to show that S. was made a party to the suit, or that any steps were taken by him further than to file said statement, except to appeal from the decree rendered in favor of complainant; *Held*, That the appeal must be dismissed. *Ib.*

APPEARANCE.

1. Where on appeal from the county court, in proceedings to prove up a claim against an estate, the transcript shows that the executor or administrator, made an appearance, the defendant in the district court cannot be permitted to show, by affidavit, that he did not appear, and thus contradict the record of the county court. *Voorhies & Co. v. Ex-bank, Ex.*, 274.

2. Where it appears from the exemplification of a foreign judgment, that defendant appeared, and submitted to the jurisdiction of the court, he cannot in a subsequent action on the judgment, object that he had no notice of the former suit. *Walker, Adm'r, v. Lathrop*, 516.

ARBITRATORS.

1. The report of referees or arbitrators, is entitled to, at least, the same consideration as the verdict of a jury. *Dunn v. Starkweather*, 456.

2. It requires something more than merely the opinion or conjecture of the party complaining, to overthrow the finding of referees or arbitrators. If there is error or mistake in their finding, it must be made to appear. *Ib.*

3. Where in an action of right, the parties, in writing, submitted the matters in controversy to arbitrators or referees, who were to examine the land and improvements thereon; take testimony, if desired, in order to determine the value of the improvements; to ascertain the annual value of the use and occupation of the land, from the time the plaintiff's title accrued, until the first of March, 1857; and to ascertain and report at the next term of the district court, all the necessary facts upon which the court was to predicate its judgment; and where on the coming in of the report of the arbitrators or referees, the defendant made an affidavit, that the referees had not allowed him the just and true value of his improvements; that they were worth double the value reported by the referees; and that he believes that said referees, in arriving at the amount fixed by them, had omitted to take into consideration a part of the improvements made upon the land by defendant, whereby great injury and injustice would be done him, unless the matters were again referred to them for consideration—upon which affidavit was based an application to the court, to refer the matter anew to the arbitrators or referees, for a full and perfect report and with direction to strike out so much of the report as awards rents and profits of the land to the plaintiff, which motion was overruled, and judgment rendered on the report in favor of the plaintiff, for the title and possession of the land, and for the defendant, for the value of the improvements, as ascertained by the referees, af-

ter deducting the rents; *Held*, That the application was properly overruled. *Ib.*

ASSIGNMENT.

1. Where the plaintiff is in possession of the note on which suit is brought, and is the payee therein, he will be presumed rightly in possession of it; and the assignment on the back of the note will be taken to have been erased by proper authority. *Goddard v. Cunningham*, 400.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. The debts due by the assignor to his creditors, are a sufficient consideration for the making of an assignment for the benefit of creditors; and in order to make such an assignment valid, it is not necessary, that a consideration should pass from the assignee to the assignor. *Meeker v. Sanders*, 61.

2. When possession accompanies the conveyance of personal property, it is not necessary that the deed should be acknowledged and recorded. *Ib.*

3. Where the intention of the grantor can be ascertained from the deed, with reasonable certainty, the want of minute accuracy, and the disregard of the usual forms, will not render the instrument void. *Ib.*

4. The fact that an assignment for the benefit of creditors, contains no schedule of the debts intended to be secured; that no inventory is given of the property conveyed; that the rights of the creditors are not distinctly defined; and that no specific directions are given to the trustee, as to the time within which the property is to be converted into money, are not sufficient to render the assignment void. *Ib.*

5. An assignment for the benefit of creditors, in which the assignor declares that "the possession of the goods, and the use of the store-house, are given to the assignee, and the notes and accounts transferred to him, to the end, and for the purpose of executing the trust, and the payment of the debts as fast as possible, and as they become due," does not, by this language, give the preference to any creditor, by reason of his debt first falling due. *Ib.*

6. Where an assignment for the benefit of creditors, authorized the assignee "to take such steps for the sale and disposition of the goods, as he may deem proper; *Held*, That no intent to hinder and delay creditors, could be inferred from the language used. *Ib.*

7. If a deed of assignment for the benefit of creditors, does not convey all the property of the assignor, liable to the payment of his debts, it is good for what it does convey; and that it does not include all, is no sufficient reason for adjudging it bad, for what it does include. *Ib.*

8. No neglect of duty by the assignee, and no misapplication of the trust funds, will render an assignment for the benefit of creditors, void. *Ib.*

ATTACHMENT.

1. It is not necessarily a sufficient ground for quashing a writ of attachment, that it does not follow the action, or, in other words, that the suit is against two, and the writ against one of the defendants only. *Patterson v. Stiles*, 54.

2. Nor is it a sufficient reason for quashing an attachment issued in a suit against two defendants, that the attachment bond is made to one, and not to both defendants. *Ib.*

3. Where in an action against two defendants, on a joint promissory note, the petition asked an attachment against one of the defendants, on the ground that he had disposed of his property, with intent to defraud his creditors, and upon which a writ of attachment issued; and where at the return term of the writ, the defendant, against whom the attachment issued, moved the court to quash the writ, for the following reasons: 1. That the writ does not follow the action, in this—the cause of the action is joint and the suit against two defendants, whilst the writ runs against one defendant only; 2. The petition shows no cause for a joint writ of attachment; the writ is not against both defendants, but against one, when the same could only issue against both; 3. That the attachment bond does not follow the action, it being given to one, and not to both, defendants: which motion was overruled by the district court; *Held*, that the court properly overruled the motion. *Ib.*

4. It is error to refuse leave to a plaintiff in a suit commenced by attachment, to amend his affidavit for the writ, or to quash the attachment, on the ground of a defect in the affidavit, which is the result of oversight, and which the plaintiff asks leave to amend. *Burns v. Pritchard*, 56.

5. Where an attachment was sued out on the ground that the defendant had property, goods, &c., not exempt from execution, which he refused to give either in payment or security of the debt, and the word “not,” between “goods, &c.,” and “exempt,” was omitted by oversight; and where the court dissolved the attachment, on account of the defect in the affidavit, although the plaintiff asked leave to file an amended affidavit, as soon as the defect was discovered, which leave was refused; *Held*, That the court erred in refusing the plaintiff leave to amend the affidavit, and in quashing the attachment. *Ib.*

6. In an action on a penal bond, for the recovery of damages, it is not necessary, in order to obtain an attachment, that the petition should be presented to, and the attachment allowed by, some judge of the supreme, district, or county courts, under section 1851 of the Code. *Lord v. Gaddis*, 57.

7. Where in an action for the recovery of damages on a penal bond, the penalty named in the bond was five hundred dollars, which penalty was not intended as liquidated damages, and the plaintiff claimed one thousand dollars, and in order to obtain an attachment, made an affidavit that that sum was due him from the defendant; and where the defendant moved to quash the attachment on the ground: 1. That the action was not founded on contract, and the attachment had not been presented and allowed, as required by section 1851 of the Code; 2. That the sum claimed was unconscionable and unreasonable, and the petition did not state, as nearly as practicable, the amount due; which motion was overruled; *Held*, That the motion was properly overruled. *Ib.*

8. Before the actual return of a writ of attachment, it is the duty of the officer to serve it; and though the defendant may have had no property when the writ was first placed in the hands of the officer, and though the officer may have indorsed that fact upon the writ, yet if the defendant subsequently, and before the return of the writ, acquires property, or if further search discovers property belonging to him, it is proper for the officer to attach it. *Courtney v. Carr*, 238.

9. An indorsement by a sheriff upon a writ of attachment, that there is no property of the defendant within his county, does not preclude his successor, to whom the writ has been delivered, from levying the attachment upon property of the defendant, nor render his acts irregular. *Ib.*

10. A mortgagee of real estate possesses no interest or title in the lands mortgaged, that can be attached. *Ib.*

11. Where an action is commenced by attachment against a non-resi-

dent, who is a mortgagee of real estate situated in the State, a levy of the attachment upon the lands so mortgaged to the defendant, will not give to the district court of the county in which the lands lie, jurisdiction of the cause. *Ib.*

12. Where the name of the plaintiff in a suit commenced by attachment, is signed to the attachment bond, by the attorney who commenced the suit, it will be presumed in the appellate court, in the absence of any showing to the contrary, that it appeared to the district court that the attorney had authority to sign the name of his client to the bond. *Goddard v. Cunningham*, 400.

13. Section 1847 of the Code, in relation to attachments, does not mean that the original petition in the suit, must constitute that in attachment also, when the writ is sued out at the commencement of the suit; but that there must be a separate petition, if it is sued out subsequent to the institution of the action. *Shapleigh et al. v. Roop et al.*, 524.

14. The petition for a writ of attachment, may be either the original petition in the action, or a separate one, filed at the same time. *Ib.*

15. Where a plaintiff commenced his action by filing two petitions at the same time—one claiming to recover on a promissory note, for \$648.54, with interest after maturity, and claiming one thousand dollars damages, and the other asking an attachment against the defendants, stating that they were indebted to the plaintiffs in the sum of \$671.09, which was then due, and setting forth the cause for an attachment under the act of 1853, which was properly sworn to; and where the defendants moved to dissolve the attachment, which motion was sustained; *Held*, That the court erred in quashing the attachment. *Ib.*

ATTORNEY AND CLIENT.

1. Where an attorney recovers a judgment in his own name, on a note or claim sent to him for collection, and the amount of which is made out of property of the defendant, and paid over to the client, the attorney, upon being subsequently compelled to refund the money so paid to the client, to a party having a prior lien on, or right to, the property sold to satisfy the judgment, may recover back from his client the money so collected and paid on the judgment. *Seevers, Adm'r v. Hamilton*, 199.

2. In such a case, if the judgment obtained in the name of the attorney, has been satisfied of record, the attorney, in order to recover, must make the client whole, by showing that the satisfaction of the judgment has been set aside, or that there is, in some form, recourse against the original defendant, within the power and control of the client. *Ib.*

3. Where the name of the plaintiff in a suit commenced by attachment, is signed to the attachment bond by the attorney who commenced the suit, it will be presumed in the appellate court, in the absence of any showing to the contrary, that it appeared to the district court, that the attorney had authority to sign the name of his client to the bond. *Goddard v. Cunningham*, 400.

4. Where the defendants in an action, filed a motion that W. be required to show his authority for appearing as the attorney for complainant, which motion was supported by an affidavit of one of the defendants, stating that he had employed said W. as an attorney in the defense of said cause; and that he had undertaken to act in that capacity, representing that he had no engagement to conflict with such undertaking; and where the said W., filed an affidavit, stating that in October previous, one of the defendants had expressed a desire to retain him; that he was then in no manner employed in the cause; that he was then willing to be engaged on the part

of the defendants; that afterwards another of said defendants informed him that this retainer was without authority, and it was their, (defendants') wish that he should retire from the cause; that he had no professional consultation with any one in making up the pleadings; that he never received any fee from the defendants, and considered himself entirely discharged; that in February or March after this, he was employed by the attorney of record for complainant, to appear for them; and that he had their written authority to that effect; and where the court sustained the motion, and required the said W. to show his authority to appear; *Held*, That there was no error in the proceeding. *The State, ex rel. the Attorney General v. Tilghman et al.*, 496.

BILL OF EXCEPTIONS.

1. A bill of exceptions, showing the improper testimony admitted, is the proper mode of bringing the matter to the attention of the supreme court. *The State v. Strong*, 72.

2. A bill of exceptions which embraces all the rulings and decisions of the court on the trial, complained of, and shows that the exceptions were taken in fact at the proper time, is unobjectionable. It is not necessary that each ruling complained of, should be the subject of a separate bill of exceptions. *Anderson v. Ames & Co.*, 486.

3. Where it does not appear from the transcript of a cause, that any exception was taken to the instruction complained of, at the time it was given, the appellate court will not inquire whether or not the instruction was erroneous. *Hall v. Denise*, 584.

BOND.

1. An action on a penal bond, for the recovery of damages, is an action founded on contract. *Lord v. Gaddis*, 57.

2. In an action on a penal bond, for the recovery of damages, it is not necessary, in order to obtain an attachment, that the petition should be presented to, and the attachment allowed by, some judge of the supreme, district, or county courts, under section 1851 of the Code. *Ib.*

3. In an action on an agreement in the nature of a penal bond, the plaintiff cannot recover the penalty named in the agreement, nor any sum more than nominal, until some damage is averred and shown. *Linder v. Lake*, 164.

BOOKS OF ACCOUNT.

1. Where on the trial of a cause, the plaintiff produced a small book, containing the account on which suit was brought, in which were charges against the defendants and other persons, which account among other things, charged the defendants with a certain quantity of stone; and where the plaintiff testified that the charges in said book against the defendants, were not made at or near the time of the transaction, for the reason that he was not present when the defendants were getting the stone; that the defendants told him, after they had finished getting the stone, the amount, which he then entered as appeared in said book; that this was his book of original entries; and that the charges therein made were true; and where the defendants objected to the introduction of the book in evidence: 1. Because the same was not a book of accounts within the meaning of the Code; and 2. Because the entries were not proper evidence, on account of the manner of making them, which objections were overruled, and the book admitted in evidence; *Held*, 1. That the book, so far as it related to the stone, was properly admitted in evidence; 2. That as to the other items of the account, the book should have been rejected; 3. That the showing of the plaintiff

brought the book within the reason and spirit of the statute. *Anderson v. Ames & Co.*, 486.

BRIDGE.

1. In an action for damages resulting from an injury occasioned by a defective road or bridge, the plaintiff, to entitle him to recover, must not only show some negligence on the part of the defendant, but ordinary care and diligence on his own part. *Rusch v. The City of Davenport*, 443.

2. The reasonable care to be shown by the plaintiff in such a case, need not be directly shown, but may be inferred by the jury from the circumstances of the case. *Ib.*

3. The degree of care required of the plaintiff in such a case, is such care as persons of common prudence generally exercise; and whether he has exercised such degree of care, is a question of fact, or a mixed question of law and fact, to be determined by the jury under the direction of the court. *Ib.*

4. Where in an action to recover damages for an injury occasioned by a defective bridge, the court instructed the jury, that if the plaintiff knew of the defect, or could have seen the same, by the exercise of ordinary care, and that if he imprudently and carelessly drove his horse upon the bridge, and the accident occurred in consequence of such imprudence and carelessness, or if the accident could have been avoided, by the exercise of ordinary care and prudence, they must find for the defendant; *Held*, That the instruction was correct. *Ib.*

5. Where in an action for damages for an injury resulting from a defective bridge, the defendant asked the court to instruct the jury as follows: "That the plaintiff having sued the defendant for damages, the burden of proof is upon him to make out a case, and he is not entitled to recover, unless he has shown, not only the defect in the bridge, or crossing, and the injury, but also, in addition to these facts, that the accident did not happen in consequence of the want of ordinary prudence and care on his part," &c.; which instruction the court refused, and instead thereof charged the jury substantially as follows: "That they must be satisfied that a defect existed in the bridge, which defendant was bound to keep in repair, and that the accident happened in consequence of the defect; that if they believe the bridge was so defective as to be unsafe for crossing; that the plaintiff in attempting to cross, used ordinary care and prudence; and that the accident happened in consequence of the defect, they must find for the plaintiff: but that if the defect was manifest and apparent; if plaintiff knew of the defect, or could have seen the same, by using ordinary care and prudence, and imprudently and carelessly drove his horse upon the same, and the accident happened in consequence of such imprudence and carelessness; or if the accident could have been avoided by the exercise of ordinary care and prudence, they must find for the defendant;" *Held*, That while the court did not, in so many words, charge the jury that the burden of proof was upon the plaintiff to show that the accident happened without any want of reasonable care on his part, yet that the instruction given amounted in effect to such ruling. *Ib.*

6. The term bridge embraces every structure in the nature of a bridge, over any obstruction to the highway, whether a river, ditch, or other passage for water. *Ib.*

7. Where a city digs a ditch, and covers it at the street crossing with boards for the whole width of the street, it is the duty of the city to keep it in a suitable condition for crossing upon any part of it. *Ib.*

8. The city of Davenport, in its corporate capacity, is liable for an injury resulting from the defective condition of its streets and bridges. *Ib.*

9. The necessities of travel may require a bridge to be wider than six-

teen feet; and section 517 of the Code, which provides that "bridges are parts of the public highways, and must not be less than sixteen feet," does not mean that a road district is, in no case, required to construct its bridges more than sixteen feet wide. *Ib.*

10. Where in an action against a road district for the recovery of damages for an injury resulting from a defective bridge, the defendant asked the court to instruct the jury substantially as follows: "That the city of Davenport, as a road district, was not bound to keep the bridge in a suitable condition for crossing, for a greater width than sixteen feet," which instruction was refused; *He'd*, That the court properly refused the instruction.

CERTIORARI.

1. The mode of revision in cases of contempt is by *certiorari*, under section 1606 of the Code. *Dunham v. The State*, 245.

CARE AND NEGLIGENCE.

1. In an action for damages resulting from an injury occasioned by a defective road or bridge, the plaintiff, to entitle him to recover, must not only show some negligence on the part of the defendant, but ordinary care and diligence on his own part. *Rusch v. The City of Davenport*, 448.

2. The reasonable care to be shown by the plaintiff in such a case, need not be directly shown, but may be inferred by the jury from the circumstances of the case. *Ib.*

3. The degree of care required of the plaintiff in such a case, is such as persons of common prudence generally exercise; and whether he has exercised such degree of care, is a question of fact, or a mixed question of law and fact, to be determined by the jury under the direction of the court. *Ib.*

4. Negligence is the omitting to do something that a reasonable person would do, or the doing something that a reasonable person would not do. *Ib.*

5. Where in an action to recover damages for an injury occasioned by a defective bridge, the court instructed the jury that if the plaintiff knew of the defect, or could have seen the same, by the exercise of ordinary care, and that if he imprudently and carelessly drove his horse upon the bridge, and the accident occurred in consequence of such imprudence and carelessness; or if the accident could have been avoided, by the exercise of ordinary care and prudence, they must find for defendant; *Held*, That the instruction was correct. *Ib.*

6. Where in an action for damages for an injury resulting from a defective bridge, the defendant asked the court to instruct the jury as follows: "That the plaintiff having sued the defendant for damages, the burden of proof is upon him to make out a case, and he is not entitled to recover, unless he has shown, not only the defect in the bridge or crossing, and the injury, but also, in addition to these facts, that the accident did not happen in consequence of the want of ordinary prudence and care on his part," &c.; which instruction the court refused, and instead thereof, charged the jury substantially as follows: "That they must be satisfied that a defect existed in the bridge, which defendant was bound to keep in repair, and that the accident happened in consequence of the defect; that if they believe the bridge was so defective as to be unsafe for crossing; that the plaintiff, in attempting to cross, used ordinary care and prudence; and that the accident happened in consequence of the defect, they must find for the plaintiff; but that if the defect was manifest and apparent; if plaintiff knew of the defect, or could have seen the same, by using ordinary care and prudence, and imprudently and carelessly drove his horse

upon the same, and the accident happened *in consequence of such imprudence and carelessness*; or if the accident could have been avoided by the exercise of ordinary care and prudence, they must find for the defendant:" *Held*, That while the court did not, in so many words, charge the jury that the burden of proof was upon the plaintiff to show that the accident happened without any want of reasonable care on his part, yet, that the instruction given, amounted in effect to such ruling. *Ib.*

CONSENT.

1. As soon as an offer by letter is accepted, the consent is given and the contract is completed, provided the party making the offer was alive when the offer was so accepted. *Moore v. Pierson et al.*, 279.

2. While it is true, that there can be no contract, without the consent of all the parties to it, it is not necessary that their wills should concur at the same instant, if the will of the party receiving the proposition, is declared before the will of the party making it is revoked. *Ib.*

3. While the consent of one party may precede the other, yet the will of the party offering, must continue down to time of the acceptance by the other party; and the presumption is, unless the contrary appears, that the will of the party making the proposition, does so continue. *Ib.*

CONSIDERATION.

1. The debts due by the assignor to his creditors, are a sufficient consideration for the making of an assignment for the benefit of creditors; and in order to make such an assignment valid, it is not necessary that a consideration should pass from the assignee to the assignor. *Meeker v. Sanders*, 61.

2. Where an action is brought upon a written contract, the objection that no consideration is shown upon the face of the instrument, or that none is averred by the plaintiff in his petition, cannot be raised by a demurrer. *Linder v. Lake*, 164.

3. The want of consideration, or the failure, in whole or in part, of the consideration of any written contract, must be averred and shown by way of defence. *Ib.*

4. No action can be maintained on a contract, the consideration of which is either wicked in itself, or prohibited by law. *Marienthal, Lehman & Co. v. Shafer et al.*, 223.

5. As between the parties, the conveyance of real estate by a parent to a child, will be upheld, as being founded upon a meritorious consideration. *Moore v. Pierson et al.*, 279.

6. A promissory note, with a proviso as follows: "Provided that John C. Fremont has not a majority of six thousand votes at the ensuing election in the State of Iowa," is void under section 2724 of the Code. *Sipe v. Finarty*, 894.

7. In order to sustain an action on such a note, the plaintiff cannot show that it was given for a full and valuable consideration. *Ib.*

8. Where an action was brought on an agreement in writing, as follows: "State of Iowa, Clayton county—1855. We, the undersigned, agree to pay the sum of money annexed to our names, as subscribed by us in our own handwrite, whenever the county judge of Clayton county shall certify on the back of this paper, that a good and substantial bridge has been built across Turkey river, at Millville, in the county of Clayton, designating, also, the person to whom payment shall be made;" to which instrument, it is averred by the petition, the defendant subscribed fifty dol-

lars, and that on the 7th of May, 1857, the county judge of Clayton county, certified on the back of said paper, that a good and substantial bridge had been built across Turkey river, at Millville, in the county of Clayton, and that the several sums of money subscribed, were justly due to the plaintiff; and where the petition was demurred to, and the demurrer sustained by the court; *Held*, 1. That it was not necessary for the plaintiff to aver the consideration upon which the agreement was executed; 2. That it was not necessary for the plaintiff to aver that he had built the bridge; 3. That the fulfilment of the conditions upon which the money was payable was sufficiently averred. *Towsley v. Olds*, 526.

CONSTITUTION.

1. The act entitled "An act legalizing the issue of county, city, and town corporation bonds in the counties of Lee and Davis," (Stat. of 1857, 447), is not unconstitutional. *McMillen et al. v. Boyles, County Judge*, 304.

2. The act "legalizing the issue of county, city, and town corporation bonds in the counties of Lee and Davis," (Statute of 1857, chapter 258), is not in violation of section 6 of the first article of the constitution. *McMillen et al. v. Boyles, County Judge*, 391.

3. Section five of the act for the suppression of intemperance, which provides that "no action of any kind shall be maintained in any court of this State, for intoxicating liquors, or the value thereof, sold in any other State or country, contrary to the laws of said State or country, or with intent to enable any person to violate any provision of this act," is not unconstitutional and void, as operating to impair the obligation of contracts. *Davis v. Bronson*, 410.

4. The saving clause in section three of the 12th article of the constitution of the State of Iowa, applies only to offenses committed before the same took effect. *The State v. Rollet*, 535.

5. The fourteenth section of the act entitled "An act to incorporate the city of Mount Pleasant," approved July 15, 1856, which invests the city council with authority, among other things, to make ordinances "to license, tax and regulate auctioneers, transcient merchants, hawkers, pedlars and pawn-brokers," is not unconstitutional and void. *The City of Mount Pleasant v. Clutch*, 546.

CONTEMPT.

1. Chapter 251 of the Laws of 1857, entitled "An act providing for appeals in criminal cases," does not confer the right to appeal from an order to punish for a contempt. *Dunham v. The State*, 245.

2. The mode of revision in cases of contempt is by *certiorari*, under section 1606 of the Code. *Ib.*

3. To constitute a contempt, under the first specification of section 1598 of the Code, the act or behavior complained of, must have taken place in the actual or constructive presence of the court. *Ib.*

4. To render a party guilty of contempt, under the first specification of section 1598 of the Code, the contemptuous or insolent behavior must be *towards the court*—the court must be engaged in the *discharge* of a judicial duty—and the behavior must tend to impair the respect due to its authority. *Ib.*

5. The contemptuous and insolent behavior need not be in the court room, and under the eye of the court, in order to amount to a contempt. *Ib.*

6. Where by a general rule, or by a special rule made as to some case

on trial, the publication of the testimony pending an investigation, has been prohibited, a willful violation of such rule may amount to a contempt, upon the ground that it would be a resistance to the order thus made; and especially so, if the rule itself declared such an act a contempt. *Ib.*

7. The provisions of the Code upon the subject of contempts, are a limitation upon the power of the court to punish for any other contempts. *Ib.*

8. The publication of articles in a newspaper, reflecting upon the conduct of a judge, in relation to causes pending in his court, and which were disposed of before the publication, or the publication of the evidence and the arguments of counsel in a case undisposed of, in which there was no rule of court prohibiting such publication, however unjust and libelous the publications may be, do not amount to contemptuous or violent behavior towards the court, under chapter 94 of the Code; nor are they so calculated to impede, embarrass, or obstruct the court in the administration of the law, as to justify the summary punishment of the offender under that chapter. *Ib.*

CONTINUANCE.

1. An affidavit for a continuance, on account of the absence of witnesses, or for the reason that there had not been sufficient time to take their depositions, which does not state the names and residences of such witnesses, nor what facts the affiant expects to prove by them, or show some excuse therefor, is fatally defective. *The State, ex rel. The Attorney General v. Tilghman et al.*, 496.

2. Where a party to a suit calls upon his adversary to answer or reply under oath, and such answer or replication is made, he is not entitled to a continuance of the cause, in order to procure the attendance of the party making the answer or replication under oath, as a witness, to testify concerning the matters embraced in the sworn answer or replication. *Stevens v. Campbell*, 538.

CONTRACT.

1. No action can be maintained on a contract, the consideration of which is either wicked in itself, or prohibited by law. *Marienthal, Lehman & Co v. Shafer et al.*, 228.

2. The court will not assist a party to regain that which he has parted with, for an illegal purpose; and the same principle prevails where it is attempted to recover that which was intended to be sold in violation of law. *Ib.*

3. Section 108 of the Code does not apply to parol or implied contracts entered into by a county; and the words "contracts to be formally executed," in that section, indicate a distinction among written contracts. *Ring v. The County of Johnson*, 285.

4. Where a negotiation is carried on between parties residing at a distance from each other, by letter, the contract is complete, when the answer containing the acceptance of a distinct proposition, is dispatched by mail or otherwise, provided it be done with due diligence after the receipt of the letter containing the proposal, and before any intimation is received that the offer is withdrawn. *Moore v. Pierson et al.*, 279.

5. As soon as an offer by letter is accepted, the consent is given, and the contract is completed, provided the party making the offer was alive when the offer was so accepted. *Ib.*

6. While it is true that there can be no contract without the consent of all the parties to it, it is not necessary that their wills should concur at the same instant, if the will of the party receiving the proposition, is declared before the will of the party making it is revoked. *Ib.*

7. While the consent of one party may precede the other, yet the will of the party offering, must continue down to the time of the acceptance by the other party; and the presumption is, unless the contrary appears, that the will of the party making the proposition does so continue. *Ib.*

8. Where on the 25th of November, 1854, M., who resided in Iowa, made an offer by letter to P., who resided in California, for the purchase of his farm, who, on the 30th of March, 1855, replied, declining the proposition of M., and making a new proposition; and where M., on the 23d of May, 1855, again wrote to P., accepting the proposition made by him; *Held*, That the contract was complete from the moment that M. wrote the letter of the 23d of May, and deposited it in the post office. *Ib.*

9. Where there is an agreement between the parties to a written contract, for a consideration, to extend the time of payment to a given period, an action upon the written contract cannot be sustained, if brought before the expiration of the time for which the payment was extended. *Cox & Shelley v. Carrell & Co.*, 350.

10. The period for the performance of a written contract, may be varied by a subsequent written agreement. *Ib.*

11. Generally speaking, the validity of a contract is to be determined by the law of the place where made. If valid there, it is, by the general law of nations, held valid everywhere, by the tacit or implied consent of the parties. *Davis v. Bronson*, 410.

12. But this rule is subject to important exceptions, viz: 1. That neither the State nor its citizens may suffer any injury or inconvenience, by giving legal effect to the contract; 2. That the consideration of the contract be not immoral, and the giving effect to it will not have a bad tendency, or exhibit to the citizens of the State, an example pernicious and detestable; 3. That the contract be not opposed to the policy and institutions of the State, where it is sought to be enforced. *Ib.*

13. To give effect to contracts made out of the State, is an act of comity due from the courts of the State in which they are sought to be enforced, to the State in which they were made. The *lex loci* is to be adopted in deciding on the nature, validity, and construction of the contract. So far the obligation of the law of comity extends, but no farther. *Ib.*

14. A State may say how far the laws of another State are to be enforced by her courts; and this, without impairing the obligation of contracts. *Ib.*

15. Contracts which are in evasion or fraud of the laws of a country, or of the rights or duties of its subjects—against good morals or against good religion—or against public right; and contracts opposed to the national policy, or national institutions, are deemed nullities in every country affected by such contracts, although they may be valid by the laws of the place where made. *Ib.*

16. No State is bound to lend the assistance of its courts to enable a party to evade or to contravene its laws, or to enforce a contract subversive of its policy or institutions, although the contract may have been valid in the place where made, and might have been enforced in the courts of that State. *Ib.*

17. Laws made prior to the formation of a contract, cannot impair its

obligation, because all existing laws enter into the contract when made, and define and determine it. *Ib.*

COUNTY.

1. In an action against a county, on interest coupons attached to county bonds, issued in payment of subscription to the capital stock of a railway corporation, it is not necessary to set out in the petition the power of the county to make the contract. *Ring v. The County of Johnson*, 265.

2. Under section 108 of the Code, a promissory note issued by a county, need not be executed by a county judge in his official capacity, and acknowledged by him, nor have the county seal affixed. *Ib.*

3. Section 108 of the Code does not apply to parol or implied contracts entered into by a county; and the words "contracts to be formally executed," in that section, indicate a distinction among written contracts. *Ib.*

4. Where interest coupons attached to county bonds, were signed, "By order of the Judge of the county court of the county of Johnson, State of Iowa, S. J. HESS, clerk of the county of Johnson," and to which no county seal was attached; *Held*, That the seal of the county was not essential to the validity of the instrument, and that the instrument was so executed as bind the county. *Ib.*

5. Where interest coupons issued by a county, recognize the fact, that they constitute a part of, and belong to, certain bonds, and recite that they are given for the interest becoming due upon such bonds, it is to be presumed that the bonds were correctly executed by the county judge, and are under the county seal. *Ib.*

6. An action may be maintained against a county, upon interest coupons issued by it, without setting out in the petition the bonds to which the coupons were originally attached. *Ib.*

7. The act entitled "an act legalizing the issue of county, city, and town corporation bonds in the counties of Lee and Davis," (Statute of 1857, 447), is not unconstitutional. *McMillen et al. v. Boyles, County Judge*, 304.

8. The power to subscribe to the capital stock of railroad corporations, and to issue county bonds in payment of such subscriptions, having been conferred upon the counties, any defect in the exercise of the power, may be cured by the General Assembly of the State. *Ib.*

9. The legislature possessed the power to enact the act entitled an act "legalizing the issue of county, city, and town corporation bonds in the counties of Lee and Davis." Statute of 1857, chapter 258. And that statute had the effect of legalizing the vote taken in Lee county in 1856, by which the people of that county determined to issue bonds and take stock in three several railroad companies, then constructing their roads through said county. *McMillen et al. v. The County Judge, &c.*, 391.

COUNTY BONDS.

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essential to the validity of the instrument, and that the instrument was so executed as to bind the county. *Ib.*

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6. The act "legalizing the issue of county, city, and town corporation bonds in the counties of Lee and Davis," (Statute of 1857, chapter 258), is not in violation of section six of the first article of the constitution. *Ib.*

COUNTY TREASURER.

1. No authority to sell lands for the unpaid taxes of any year prior to 1851, was vested in the county treasurers, until the passage of the act entitled "An act to enforce the claims of the State and county against lands and lots, on which the owners have failed to pay the taxes charged thereon, prior to 1851," approved January 22, 1858. *Bleidorn v. Abel et al.*, 5.

CRIMINAL LAW.

1. Where an indictment contained three counts, the first two of which charged that the defendant leased a house, knowing that the lessee intended to use it as a place, or resort, for the purpose of prostitution and lewdness, and the third charged him with letting it in like manner, and knowingly permitting such lessee to use the same for such purpose: *Held*, That the indictment did not charge two distinct offenses. *The State v. Abrahams*, 117.

2. The law makes no distinction between the act of letting a house for the express purpose of prostitution, and the letting of it for a proper purpose, and afterwards knowingly permitting it to be used for the purpose of prostitution; and if a party knowingly permit the lessee to use the premises for such illegal object, he is liable under section 2712 of the Code, although, at the time he leased them, he did not know they were to be so used, and did not lease them for that purpose. *Ib.*

3. Where the defendant is charged with knowingly permitting his house to be used for the purpose of prostitution and lewdness, it must be shown that he did some act, or made some declaration, affirmatively assenting to the premises being so used, after he had knowledge that they were being used for such illegal purpose. *Ib.*

4. Mere inactivity on the part of the defendant, or a failure to take some steps to prevent the illegal use, is not permitting it, in the sense contemplated by the statute. An affirmative sense is necessary. *Ib.*

5. Where on the trial of an indictment, charging the defendant with letting a house for the purpose of prostitution and lewdness, and with knowingly permitting it to be so used, the court instructed the jury as fol-

lows: "That mere inactivity on the part of the defendant, or failure to take some steps to prevent the illegal use, is not permitting it, in the sense contemplated in the law; that an affirmative assent was necessary; that to make defendant liable, there must be, on his part, a consent to such use, either expressly given, or given by his silent acquiescence; that a mere failure to interfere, or to prosecute, so as to prevent the illegal use, cannot be construed to amount to a permission, or into a silent affirmative acquiescence in such use; and that if the jury find from the evidence, that the defendant did, by any act or declaration, affirmatively assent to the premises being so used, after he had knowledge of the purpose for which they were used, he is guilty as charged; and where the jury after being out some hours, came into court and stated, "that there was some trouble, as to whether the defendant should have assented to the fact charged, to the person occupying the house, or whether it could be done to any other persons," whereupon the jury were instructed as follows: "That it is not necessary that defendant should have told the lessee, that he consented to the same being used for the illegal purpose; that consenting to a thing is the result of our own mind; that all that was necessary was to find that defendant actually consented; that the assent was the result of his own mind, and need not be coupled with any other person; and that in order to ascertain the assent, the jury must find that the defendant did some affirmative act, or made some declaration, in connection therewith, or in relation thereto, from which the jury may find that the defendant did so assent; *Held*, That while one or two sentences of the latter instruction are somewhat ambiguous, yet that the concluding words distinctly hold, that the jury must find that the defendant did some affirmative act, or made some declaration, from which to conclude his assent; and that the instruction could not tend to mislead the jury. *Ib*.

6. Where on the trial of an indictment, in which the defendant was charged with the murder of his wife, committed by means of strychnine, the State introduced two witnesses, one of whom testified to certain improper conduct between the prisoner and a female named F., prior to the death of the wife, and on the day of the burial—and the other testified, that after the death of the wife, and when the prisoner was in jail, he asked him if he did not get arsenic to kill the rats, to which the prisoner answered that he did; that witness then asked him, "where?" to which the prisoner replied, "it is none of your business"—which evidence was objected to by the defendant, but admitted by the court; *Held*, That the evidence was properly admitted. *The State v. Henkle*, 380.

7. Where evidence *tends* to prove the issue, or forms a link in the chain of proof, however slight or remote may be its bearing, it is admissible. So, when material, evidence as to the knowledge and intent, or motive of a party, is always admissible. *Ib*.

8. The means of knowledge of an expert, are proper to be considered by a jury, and they should give or withhold credence in the opinion given, as they may believe the expert qualified to speak more or less intelligently and understandingly. *Ib*.

9. After the taking effect of the new constitution of the State of Iowa, a grand jury had no legal authority to inquire into offenses less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days. *The State v. Koehler*, 398.

10. Section 2914 of the Code, which requires that an indictment, when found by the grand jury, and indorsed a "true bill," by the foreman, must be presented to the court by the foreman, in their presence, and marked "filed," by the clerk, is directory merely, and the failure of the clerk to make the indorsement, is not sufficient to invalidate the proceedings. *The State v. Axt*, 511.

11. Where an indictment was properly indorsed by the foreman of the grand jury, and was marked filed by the clerk, but the indorsement of the clerk did not show that it was "presented to the court by the foreman in the presence of the grand jury;" *Held*, That the requisites prescribed by section 2916 of the Code, sufficiently appeared by the indorsement on the indictment. *Ib.*

12. It is not essential to the validity of an indictment, that it should appear from the indorsement of filing by the clerk, that it was "presented to the court by the foreman in the presence of the grand jury." *Ib.*

13. Where an indictment charged the defendant with selling intoxicating liquors by the glass or dram, on the 14th of October, 1857; *Held*, That the district court had no jurisdiction of the offense charged, and no legal authority to render judgment against the defendant. *The State v. Rollett*, 535.

14. The saving clause in section three of the 12th article of the constitution of the State of Iowa, applies only to offenses committed before the same took effect. *Ib.*

15. Where a defendant pleaded guilty to selling intoxicating liquors by the glass or dram, and being adjudged to pay a fine of fifty dollars and costs of suit, and to stand committed until the fine and costs were paid, he paid the fine and costs before the taking of the appeal; *Held*, That the defendant was not estopped from assigning errors upon the judgment and proceedings of the district court. *Ib.*

DAMAGES.

1. No damages are recoverable in *scire facias*. for delay of execution. The plaintiff recovers costs, but no damages. *Vredenburg v. Snyder*, 29.

2. An action on a penal bond for the recovery of damages, is an action founded on contract. *Lord v. Gaddis*, 57.

3. In an action by a father, for the seduction of his minor daughter, it may be shown to the jury, in aggravation of damages, that the defendant visited the daughter as a suitor, and used arts, flattery, persuasion and promises to induce her to have connection with him. *Stevenson v. Belknap*, 97.

4. In such an action, damages may be given, not only for the loss of services, and actual expenses incurred, but also on account of the wounded feelings of the plaintiff, and his anxiety, as the parent of other children, whose morals may be corrupted by the example. *Ib.*

5. Where in an action by A. L. and J. R., on a written contract, which reads as follows: "I, E. W. L., do this day, December 20th, 1855, agree and bind myself, in the sum of five hundred dollars, to have the east half of the south half of south-east quarter of section thirty-three, township eighty, range six, released of a certain mortgage executed by me to M. J., I having this day sold forty acres of said land to A. L. and J. R. Said release to be made in sixty days from this date," and which was signed by E. W. L. and E. O., the petition alleged that on the 18th day of December, 1855, the said E. W. L., in consideration of the sum of four hundred dollars, sold and conveyed to A. L. thirty acres, part of the premises described in the contract, by deed, with covenants of general warranty, and against incumbrances, and on the 19th of the same month, in consideration of the sum of two hundred and forty dollars, sold and conveyed to J. R. ten acres of the same premises, by deed, with like covenants; that the said lands were not, at the time of the said conveyances, free from incumbrance, but were subject to a mortgage executed by E. W. L. to one M. J., for the sum of eighteen hundred dollars; that after the execution and de-

livery of said deeds, the plaintiffs, upon being informed thereof, applied to E. W. L. to have the lands conveyed to them, released from the lien of said mortgage; that the said E. W. L. agreed so to do, and on the same day, in consideration of the premises, executed the instrument of writing sued on; that the said defendant did not release said lands from said mortgage, nor any part thereof; that the same remains unreleased and unsatisfied; that defendants have wholly neglected and refused to release said lands from said mortgage; and that, therefore, plaintiffs ask judgment for the penalty of said written agreement; and where the petition was demurred to, for the following reasons: 1. That there are no proper parties to the said agreement; 2. That the petition shows that the pretended agreement is without any consideration; 3. That the plaintiffs seek to recover for their several demands, in a joint action; and 4. That it is not averred or shown that plaintiffs have sustained any damage, by reason of the failure of defendants to comply with their agreement—which demurrer was sustained by the court; *Held*, 1. That the names of the obligees were implied, if not expressed; 2. That the agreement was joint, as to the obligees, and the action properly brought in their joint names; 3. That the question as to the consideration could not be raised by demurrer; 4. That the plaintiffs could, at least, recover nominal damages; and, 5. That the court erred in sustaining the demurrer. *Linder v. Lake*, 164.

6. Where in an action on a replevin bond, the petition claimed as damages the sum of seven hundred dollars—the penalty named in the bond—and the petition, in stating the cause of action, alleged that the defendants did not return the property, but converted it to their own use, by means of which the plaintiff was damaged in the sum of two hundred and fifty dollars; and where judgment was rendered for the plaintiff for the sum of four hundred and fifty dollars; *Held*. That the court did not render judgment for a greater sum than was claimed in the petition. *McGinnis v. Hart et al.*, 204.

7. Where in an action of replevin before a justice of the peace, damages are claimed in the original notice served on the defendant, the plaintiff is entitled to recover all the damages he had sustained by the illegal detention of the property. *Hoover v. Rhoads*, 505.

DAVENPORT.

1. The city of Davenport, in its corporate capacity, is liable for an injury resulting from the defective condition of its streets and bridges *Rusch v. The City of Davenport*, 443.

2. Under sections four and five of the act entitled "An act to amend an act entitled 'An act to incorporate the city of Davenport,'" approved January 22, 1855, there is no road district distinct from the city; nor has the city an existence as a corporation, distinct from its existence as a road district. *Ib.*

DEBTOR AND CREDITOR.

1. The rule, that where a creditor has two funds out of which he may make his debt, he may be required to resort to that fund upon which another creditor has no lien, will never be applied, unless it can be done without injustice to the creditors, or other party in interest, having a title to the double fund, and also without injustice to the common debtor. *Dickson et al. v. Chorn et al.*, 19.

2. In order to give a creditor the right to marshal assets or securities, it must appear that such assets or securities were liable to the general debts of the debtor. *Ib.*

3. On the first of March, 1856, C. & D. were doing business as a mercantile firm, and on the 6th of that month, executed their notes to the complainants, for goods sold and delivered. On the first of April, 1856, C. & D. were indebted to J. W. & Co., in the sum of \$2,800. and to secure the same, executed to them a mortgage on certain town lots, the homestead of the said partners, which mortgage was signed by the said C. & D., and their wives. On the 13th day of May, in the same year, C. & D. failed, and made an assignment for the benefit of their creditors to K. & B. On the 22d of July following, J. W. & Co., in consideration of one dollar, released the said premises from the operation of said mortgage, and presented their said claim to the assignees, who received and allowed the same, as valid and subsisting against C. & D., and the property in their hands. The property mortgaged to J. W. & Co. was sufficient to pay their debt, and was not included in the assignment. The assignees having declared their intention to pay the said J. W. & Co., from the assets in their hands, the same per centum as all the other creditors, a portion of the creditors filed their bill, asking that J. W. & Co. shall either abide by their mortgage, and exhaust the security thus given to them, or that they shall be compelled to assign all securities in their hands, for the benefit of all the creditors, and that if said security is sufficient to pay the debt of J. W. & Co., they be compelled to resort to that, and enjoined from receiving any of the proceeds of the property in the hands of the assignees—which bill was dismissed; *Held*, That the bill was properly dismissed. *Ib.*

4. The fact that an assignment for the benefit of creditors, contains no schedule of the debts intended to be secured; that no inventory is given of the property conveyed; that the rights of the creditors are not distinctly defined; and that no specific directions are given to the trustee, as to the time within which the property is to be converted into money, are not sufficient to render the assignment void. *Meeker v. Sanders*, 61.

5. An assignment for the benefit of creditors, in which the assignor declares that "the possession of the goods, and the use of the store-house, are given to the assignee, and the notes and accounts transferred to him, to the end, and for the purpose of executing the trust, and the payment of the debts as fast as possible, and as they become due," does not, by this language, give the preference to any creditor, by reason of his debt first falling due. *Ib.*

6. Where an assignment for the benefit of creditors, authorized the assignee "to take such steps for the sale and disposition of the goods, as he may deem proper; *Held*, That no intent to hinder and delay creditors, could be inferred from the language used. *Ib.*

7. If a deed of assignment for the benefit of creditors, does not convey all the property of the assignor, liable to the payment of his debts, it is good for what it does convey; and that it does not include all, is no sufficient reason for adjudging it bad, for what it does include. *Ib.*

8. No neglect of duty by the assignee, and no misapplication of the trust funds, will render an assignment for the benefit of creditors, void. *Ib.*

DECREE.

1. A decree of foreclosure under a tax deed for lands sold in 1852, for the delinquent taxes of 1851, will not affect the interest of any person claiming a title to, or lien upon the lands, previous to the tax sale, not a party to the suit. *Bleidorn v. Abel et al.*, 5.

2. In proceedings to foreclose the equity of redemption under a tax deed, as in proceedings to foreclose a mortgage, all incumbrances, whether prior or subsequent, not made parties, are not bound by the decree. *Ib.*

3. The fact that the treasurer of a county made a mistake, and deceived the agent of the owner, in representing that certain land was not assessed, and that no taxes were to be paid on it for a given year, cannot avail the owner, in a proceeding to set aside a decree of foreclosure against the land, under a tax deed, for the taxes of that year, unless some collusion or fraudulent combination be shown between the treasurer and the purchaser of the land. *McGahan v. Carr*, 381.

4. Nor can the fact, that the land was assessed in the name of a wrong person, or that the owner, since the sale of the land for taxes, has paid the subsequent taxes on the same, avail to set aside a decree of foreclosure under a tax deed. *Ib.*

5. Although a decree of foreclosure under a tax deed, may recite that it "appeared to the court, that the defendant had been served with notice of the pendency of the suit as required by law," the complainant, in a proceeding to set such decree aside, may aver and prove, that copies of the petition and notice were never directed to him as required by section 1826 of the Code; and that the proof required, was not made, nor any excuse shown, before taking a default against him. *Ib.*

6. The proof that a copy of the petition and notice was directed to the defendant, or that his residence is unknown, as required by section 1826 of the Code, is an element of jurisdiction; and if the record does not show that such proof was made, before the default was entered, the decree is void. *Ib.*

7. Where in a proceeding to set aside a decree of foreclosure under a tax deed, the petition alleged that in 1852, complainant purchased the lands in controversy; that he was then, and continued to be, a resident of the State of Virginia; that for the year 1853, the said lands were assessed to G. and not to the complainant, the taxes amounting to \$1,93; that in 1854, his agent called upon the proper officer, to pay the taxes on said land, and was informed that said land was not assessed, and no taxes were to be paid for the year 1853; that in May, 1854, the treasurer sold said lands for the delinquent taxes of 1853, to the defendant, who, on the 9th of June, of that year, received the said treasurer's deed; that on the 24th of March, 1855, said defendant filed in the district court, his petition to foreclose the complainant's equity of redemption in and to said land; that a notice directed to complainant, was placed in the hands of the sheriff, who returned thereon that said defendant (now complainant), was not found within his county: that at the next April term of said court, an order was entered, continuing said cause until the next term, and directing publication to be made, as required by law; that at the November term, 1855, of said court, the said published notice, with the affidavit of the publisher, was filed, and thereupon default was entered against this complainant, and a decree rendered in favor of the then plaintiff, for the land; that during all this time, complainant was a resident of the State of Virginia; that he had no knowledge of the levy of said taxes, nor of the purchase by defendant of said land; that he was ignorant of the institution or pendency of said suit, or of the judgment, until the spring of 1857; that he paid the taxes for the years 1854, 5 and 6; that the notice by publication was not given, as required by law; that at the time of the rendition of said judgment, no proof was made to said court, that a copy of the petition and notice had been sent to the defendant, nor excuse shown for not sending the same; that no such copies ever were sent, in fact; and that said defendant neglected and refused to send complainant copies of the petition and notice, for the purpose of obtaining said decree, without the knowledge of this complainant—to which petition was attached a copy of the decree under the tax deed, which decree, (among other things) recited "that defendant being called, came not, but made default, and it appearing to the court, that defendant had been served with notice of the

pendency of this suit, as the law directs ; and where the court sustained a demurrer to, and dismissed the bill ; *Held*, That the court erred in dismissing the bill. *Ib.*

8. Where the parties are shown in the title of a cause in equity, it is not necessary to repeat the names of the parties in the body of the decree. *Campbell v. Ayres*, 389.

9. Where the term of court at which a decree was rendered, is mentioned in the transcript of a cause in equity, the date of the rendition of the decree need not be stated in the body of the decree, unless some act is to be done in a definite period from the date, or the rendition of the decree ; and then, if no other day is named, such act takes date from the last day of the term. *Ib.*

10. Whether a decree in equity be a interlocutory or final one, must appear from its nature. It need not be called by a name. *Ib.*

11. If a decree does not state that it is rendered upon a default, it is presumed to be upon appearance. *Ib.*

12. Where the transcript of a case shows the appearance of the parties, the case will be presumed to have been properly heard, although the decree does not state in terms, whether it was heard upon the pleadings, or upon the pleadings and proofs ; and this holds good even on appeal, to some extent. *Ib.*

13. Where a decree does not set out the facts found, upon which it is rendered, on appeal, the presumption in favor of the regularity of the proceedings of courts superior and of general jurisdiction, will assume that sufficient facts were shown to warrant the decree, unless the contrary be made to appear from the record or from the testimony. *Ib.*

14. It is not necessary in a decree in equity, to set out the facts found, upon which the decree is based. All the papers of a cause constitute the record in a chancery case, and the decree *assumes* them and their contents. And so of the evidence, where it is in writing. *Ib.*

15. Where a decree in equity, cancelling a deed, defines the particulars of date, &c., and names more points of description than the petition, the decree is not incongruous. If the decree clearly identifies the deed decreed to be cancelled, minor points of misdescription may be disregarded. *Ib.*

16. Where a decree, in part, requires that to be done, which the court had no power to decree, that portion of the decree beyond the authority of the court to order, becomes mere surplusage and nugatory, and forms no ground for a reversal of the decree, and especially so where it would not open the cause to a rehearing. *Ib.*

17. Where in a proceeding in equity, to cancel a deed, and to compel a conveyance to the complainant, the bill alleged that the deed to one of the respondents was never delivered—that he was not entitled to it—that he obtained it fraudulently—and that it was null and void, and gave him no title, which allegations were found by the court to be true ; and where the court then decreed that the respondent convey to the complainant ; *Held*, That the decree was erroneous. *Ib.*

18. Where a decree is technically defective only, on appeal, it will be corrected in the appellate court.

DEED.

1. When possession accompanies the conveyance of personal property,

it is not necessary that the deed should be acknowledged and recorded. *Meeker v. Sanders*, 61.

2. Where the intention of a grantor can be ascertained from the deed, with reasonable certainty, the want of minute accuracy, and the disregard of the usual forms, will not render the instrument void. *Ib.*

3. Where a wife unites with her husband in a conveyance in fee simple of the real estate of the husband, she is not bound by the covenants in the deed, nor is such deed a bar to any title subsequently acquired by her. *Schaffner et al. v. Grutzmacher et al.*, 137.

4. Where a party, at the time of making a deed of real estate, represents himself to be of full age, and the grantee, relying upon such representations, receives the same, the grantor cannot disaffirm the contract on the ground of infancy. *Prouty v. Edgar*, 353.

5. Where a county judge makes a deed under the act entitled "An act regulating the disposal of lands purchased in trust for town sites," approved January 22, 1853, the deed should be made to the person who, as an occupant, is entitled to the same at the time the deed is made. *Hall v. Doran*, 433.

DEFAULT.

1. Where a judgment is taken by default, it should appear affirmatively, that there has been such service and compliance with the provisions of the law, as gives the court jurisdiction over the person of the defendant; and it is clearly irregular to take such judgment, where the record discloses the fact, that there has not been such service and compliance. *Woodward v. Whitescarver et ux.*, 1.

2. A defendant, at the time of the service of the original notice, has a right to demand a copy of the petition, and to require that it be sent to a particular person, at a given place; and it is irregular to take a decree or judgment by default, when it appears that the copy of the petition was sent to another person at a different place. *Ib.*

3. An appeal may be taken to the supreme court, from a judgment rendered by default, or a decree *pro confesso*. *Ib.*

4. It is erroneous to render judgment by default, against a party after he has answered, and while the answer is still on the files of the court. *Arbuckle v. Bowman et al.*, 70.

5. In cases where there is no personal service on the defendant, and he is served by publication, the mailing of a copy of the petition and notice to the defendant, as required by section 1826 of the Code, is an essential part of the service, the proof of which, or in excuse of which, should appear of record in the case; and the record should further show, that such proof had been made, before a default was entered against the defendant. *McGahan v. Carr*, 381.

6. The property of one person cannot be divested, and vested in another, in an *ex parte* proceeding, unless the record in the cause, shows that section 1826 of the Code was strictly complied with, or the decree recites and shows affirmatively, that copies of the petition and notice were directed to the defendant, as required by that section, or an excuse for not so mailing them, before a default entered. *Ib.*

7. Section 1827 of the Code, does not apply to all cases in which a judgment by default may have been entered. *Messenger v. Marsh et al.*, 491.

8. The requisitions of section 1827 are to be complied with, where the

judgment has been regularly taken, and where the party is really in default. *Ib.*

9. In case of judgment by default, entered by mistake, or without notice to the party, or rule upon him to answer, the statute does not require an affidavit of merits in order to set aside a default.

10. In any case, where it is apparent that a judgment by default has been hastily and improvidently rendered, and where the facts are within the knowledge of the court, the default may be set aside without an affidavit of merits. *Ib.*

DELINQUENT TAXES.

1. Under the revenue act of 1847, there could rightfully be no judgment against, or sale of the lands, in 1852, for the unpaid taxes of 1849 and 1850. Such a sale could only take place in pursuance of a judgment in the district court, against the lands, for the taxes due and unpaid, which judgment could only be rendered upon a return of the county treasurer, showing that the taxes had remained due and unpaid for the term of two years from the first day of January next, after the delinquent list had been filed in his office. *Bleidorn v. Abel et al.*, 5.

2. A sale of lands in 1852, by a county treasurer, for the delinquent taxes of 1849 and 1850, derives no support from the provisions of the Code, as under section 496, the treasurer was authorized to sell in each year, only the lands on which the taxes levied the preceding year, remained unpaid. *Ib.*

3. Where it is sought to divest the title to real estate, on account of the non-payment of taxes, a strict compliance with the law is essential. *Gaylord v. Scarff*, 179.

4. After the code went into operation, and prior to the taking effect of chapter 74 of the acts of 1853, there was no power to sell lands for the delinquent taxes of any year prior to 1851.

DEMURRER.

1. By pleading over and going to trial, a party waives his demurrer to the pleadings demurred to. *Abbott v. Striblen*, 191.

2. By answering over, a party waives his objection to the pleadings demurred to. *McGinnis v. Hart et al.*, 204.

3. An answer in an action on a promissory note, which denies the assignment of the note, but is sworn to, is not demurrable for that reason. *Seachrist v. Griffeth et al.*, 390.

DEPOSITION.

1. The fact that an attorney of the party was present at the taking of a deposition in his favor, on commission and interrogatories, where it is not apparent that the attorney prompted the witness, or in any positive manner influenced him, furnishes no ground for rejecting a deposition. *Nutter v. Ricketts*, 92.

2. Where on the nineteenth of November, 1856, a party was served with notice that on the 25th of that month, a *dedimus* would be issued to William Cohill, clerk of the district court of Goodhue county, Minnesota Territory, to take the deposition of one K.; and where a deposition was returned, which, from the caption, purported to have been taken on the second of January, 1856, before William Colvill, Jr., clerk of the first judicial court of Minnesota territory, in and for the county of Goodhue,

while the certificate to the deposition shows that it was taken on the second of January, 1857; and where a motion was made to suppress the deposition on two grounds: 1. It was taken before the suing out of the *dedimus*; and, 2. It was not taken before or by the person named in the notice or commission; *Held*, 1. That it appeared sufficiently that the deposition was taken after the suing out of the *dedimus*; 2. That the second objection was well taken, and that the deposition should have been suppressed. *Jones v. Smith*, 229.

3. The order made by the inferior court, sustaining exceptions to the several parts of a deposition, should be distinctly shown, either by a formal entry, or by bill of exceptions, if it is expected that the appellate court will review the same. *Hall v. Doran*, 483.

4. Where each party took exceptions to certain depositions, and the court ordered that certain parts, "as shown and marked on the same, be excluded;" and where, by reference to the depositions, there was nothing to indicate what parts were excluded, or what portions were intended to be, by the order of the court, but on the margin of some of the depositions, were lines and crosses, as if made with a pen; but when this was done, by whom, or what was intended thereby, did not appear from the record; *Held*, That the appellate court could not adjudicate upon the correctness of the ruling of the court below in relation to the depositions.

DISTRICT COURT.

1. When the statute fixes the terms of the district court, a defendant is bound to take notice of the time when such court sits. *Butcher v. Brand*, 285.

2. It is not essential that an original notice should specify the time when the term of the district court will commence. *Ib.*

3. A defendant upon whom an original notice is served, requiring him to appear and answer "on or before the second day of the next term" of the district court, has a right to assume the term next after the service, to be the "next" term mentioned in the notice. *Ib.*

DOWER.

1. Courts of equity exercise a general concurrent jurisdiction with courts of law, in the assignment of dower, in all cases. *Phares v. Walters*, 106.

2. An action to recover dower is included within the general statute of limitations, (chapter 99 of the Code), and will be barred in the same time with other actions for the recovery of real property. *Ib.*

3. Action for the recovery of dower, commenced October 2, 1857. The petition alleged that the death of the husband took place October, 1842. Demurrer to the petition, on the ground that upon the facts stated therein, the petitioner's claim was barred by the statute of limitations. Demurrer overruled; *Held*, That the demurrer was properly overruled. *Ib.*

4. Where in an application for dower in two parcels of land, the court, by agreement of the parties, ordered that dower for both lots of land "be assigned out of one, (specifying it), but according to the value of the lots; and where the referees assigned the whole of one lot, as the dower in both lots; and where the defendant excepted to the report of the referees, on the ground that the referees could not award two thirds of one lot as the dower interest in the other lot; *Held*, That the defend-

ant was concluded by his agreement from making the objection. *Corriell v. Bronson*, 471.

5. Where exceptions were taken to the report of referees appointed to assign dower, on the ground that the value of the claimant's dower should have been ascertained by reference to the value of the premises at the time of the alienation by the husband; and where there was nothing in the report of the referees to show, whether they valued the lots at the time of the alienation, at the time of the husband's death, or at the time of the assignment of dower; *Held*, That it did not appear affirmatively that an improper value was adopted. *Ib.*

6. The word "value," in section 1294 of the Code, in relation to dower, was intended to provide for the assignment of dower according to the worth or value of the real estate, instead of the extent or quantity thereof. *Ib.*

7. Where a widow brings her suit to recover dower in two distinct parcels of land, and where the parties agree that it may be assigned entirely from one of the parcels, it is not necessary that the referees should state in their report the value of each, or either parcel of land. *Ib.*

EQUITY.

1. The rule, that where a creditor has two funds out of which he may make his debt, he may be required to resort to that fund upon which another creditor has no lien, will never be applied, unless it can be done without injustice to the creditors, or other party in interest, having a title to the double fund, and also without injustice to the common debtor. *Dickson et al. v. Chorn et al.*, 19.

2. Where parties to a suit in equity, and especially the complainant, gives to the property in controversy the name of the homestead, and treat it as such, by which its character is clearly shown, it is not necessary for the respondents, to aver or allege that it was actually used as a home. *Ib.*

3. On the first of March, 1856, C. & D. were doing business as a mercantile firm, and on the 6th of that month, executed their notes to the complainants, for goods sold and delivered. On the first of April, 1856, C. & D. were indebted to J. W. & Co., in the sum of \$2,800. and to secure the same, executed to them a mortgage on certain town lots, the homestead of the said partners, which mortgage was signed by the said C. & D., and their wives. On the 18th day of May, in the same year, C. & D. failed, and made an assignment for the benefit of their creditors to K. & B. On the 22d of July following, J. W. & Co., in consideration of one dollar, released the said premises from the operation of said mortgage, and presented their said claim to the assignees, who received and allowed the same, as valid and subsisting against C. & D., and the property in their hands. The property mortgaged to J. W. & Co. was sufficient to pay their debt, and was not included in the assignment. The assignees having declared their intention to pay the said J. W. & Co., from the assets in their hands, the same per centum as all the other creditors, a portion of the creditors filed their bill, asking that J. W. & Co. shall either abide by their mortgage, and exhaust the security thus given to them, or that they shall be compelled to assign all securities in their hands, for the benefit of all the creditors, and that if said security is sufficient to pay the debt of J. W. & Co., they be compelled to resort to that, and enjoined from receiving any of the proceeds of the property in the hands of the assignees—which bill was dismissed; *Held*, That the bill was properly dismissed. *Ib.*

4. In January, 1852, S. & S., attorneys at law, received for collection from G. E. G., two notes against B.; B. being unable to pay at once, as-

signed to W. H. S., one of the attorneys, in trust, and as collateral security on this debt, a bond which B., with one W., held against L. and J. G., for the conveyance of certain lands, amounting to one hundred acres, in which land B. held an interest of one undivided moiety. S. gave a receipt to B., identifying the bond, and stating that he was to hold the same in trust, until said B. secured by mortgage or otherwise, two notes given by him to G. E. G., dated this day, for three hundred and fifty-five dollars and sixty-one cents, each, payable in four and six months"—which receipt bears date January 2, 1852. Afterwards S. & S. received from C. & S. for collection, certain claims which they held against B., which were settled by the latter giving two notes for four hundred and twelve dollars and seventy-three cents each, and to secure them, B. made another assignment of his interest in the same bond, causing the assignment to cover the demands of both G. E. G. and C. & S. Upon this arrangement, on the 24th of January, 1852, S. & S. gave B. a new receipt, reciting the assignment of the bond to S., and the claims held by them in favor of both creditors, to-wit: two notes in favor of G. E. G., and two in favor of C. & S., and stipulating that the condition of the assignment of the bond by B. to S., was "for the purpose of securing the payment of said notes, and no other, and if B. should at any time be able to get the title to said property," the bond was to be delivered up to him, he securing the notes by mortgage on the property. On the 26th of May, 1852, S. assigned his right and title to the bond to S., his partner, who obtained the legal title to the land. On bill filed by C. & S. against S.—the party holding the legal title to the bond—and G. E. G., the other creditor—praying that the trustee might be decreed to sell the land; and claiming that they were entitled to priority of payment, or, at least to share equally in the fund with G. E. G.: *Held*, 1. That S., to whom the bond was assigned, was properly admitted to testify to the circumstances under which the bond was assigned, and the intention of the attorneys, S. & S., in relation to the rights of the creditors; 2. That such testimony did not contradict the receipt given by S. & S. to B.; 3. That G. E. G. was entitled to priority of payment out of the trust fund. *Cox & Shelley v. Garber et al.*, 211.

5. In equity, where the allegations of the petition are not denied, they are to be taken as true. *Ferrier v. Buzick et al.*, 258.

6. The purchaser of property actually in litigation, though for a valuable consideration, and though he may have had no express or implied notice, in point of fact, is affected in the same manner as if he had such notice. *Ib.*

7. The party relying upon a pending action, as notice to a purchaser *pendente lite*, must show that he has been constant and continued in its prosecution. *Ib.*

8. Where an agreement between parent and child for the conveyance of real estate is executory, exists in parol, and is unassisted by the fact of possession and permanent improvements, taken and made upon the faith of such promise, courts of equity will not aid the donee by decreeing a specific performance of the agreement. *Moore v. Pierson et al.*, 279.

9. Where the promise of the parent to convey real estate to the child, is clearly, definitely, and conclusively established, and where the child, upon the faith of it, has entered into possession, and made valuable and permanent improvements upon the land, the parent will be decreed to specifically perform the agreement. *Ib.*

10. In such cases, it will not avail the donee, if his improvements are temporary, of but little value, or simply for his convenience as an occupying tenant. They must be of a permanent character—such as clearly show that he regards and designs to treat the land as his own, and relies upon the promise of the father. *Ib.*

11. Where a defect in a bill in equity, is one of form merely, or where the case stated in the bill is such that the court can properly proceed to a decree, the insufficiency of the bill cannot, for the first time, be raised on appeal. *Aliter*, where the bill shows a want of equity. *Ib.*

12. Where in a proceeding in equity to cancel a deed, and to compel a conveyance to the complainant, the bill alleged that the deed to one of the respondents was never delivered—that he was not entitled to it—that he obtained it fraudulently—and that it was null and void, and gave him no title, which allegations were found by the court to be true; and where the court then decreed that the respondent convey to the plaintiff; *Held*, That the decree was erroneous. *Campbell v. Ayres*, 339.

13. In chancery, the answer of the respondent, upon any matter stated in the bill, and responsive to it, is evidence in his favor; and is conclusively so, unless it is overcome by evidence which is equal to the satisfactory evidence of two witnesses. *The State, ex rel. The Attorney General v. Tilghman et al.*, 496.

14. Where the answer of the respondents to a bill in chancery, is responsive to the matters stated in the bill, and there is no proof to overcome the answer, it is to be taken as true, although a general replication may have been filed. *Ib.*

15. Whether a decree in equity dismissing the complainant's bill, will bar the filing of another bill, *quare?* *Ib.*

EQUITY OF REDEMPTION.

1. In a proceeding to foreclose the equity of redemption in lands sold for taxes, against the property itself, the land should be designated and described, not only in the notice contemplated in sections 506, 1715 and 2083 of the Code, but also in the publication provided for by sections 507 and 1725. *Gaylord v. Scarff*, 179.

2. Where the proceeding to foreclose is against the land itself, under section 507 of the Code, and it is against certain named lots of land, and others, not describing them, the court will not acquire jurisdiction as to the parcels of land not described, nor will the property be bound by the decree rendered in such proceeding. *Ib.*

3. In a proceeding against real estate, to foreclose the equity of redemption, under a tax sale, in order to bind the property, it should be proceeded against by description, and the notice should specify and make known, that the plaintiff was seeking to foreclose the equity of redemption of the owner in and to said property, describing it, so that the owner may have an opportunity of knowing that his title is about to be divested. *Ib.*

4. Under section 508 of the Code, a decree of foreclosure, under a tax deed, is conclusive in the same degree as in other actions. *Ib.*

5. In a proceeding to foreclose the equity of redemption under a tax deed, the defendant may show that the taxes were paid prior to the sale. *Ib.*

6. Whether under a sale of lands for delinquent taxes, made under chapter 74 of the acts of 1853, the purchaser can proceed to foreclose the equity of redemption of the owner, by action in the manner provided by the Code, *quare?* *Ib.*

ERROR.

1. Where a *scire facias* recited, that at the September term of the district court of Marion county, A. D. 1854, an indictment was preferred by

the grand jury against one A. T. S. for larceny; that at the next April term of said court, the said defendant appeared, and upon affidavit filed, moved for a change of venue in the cause; that the venue was changed by the court to Monroe county; and the said A. T. S., together with T. L. S. his surety, in open court, entered into a recognizance, whereby they acknowledged themselves indebted to the State of Iowa in the sum of \$500, to be void on condition that the said A. T. S., indicted as afore-said, but who, *by mistake in the recital of said recognizance*, is stated to have been indicted at the April term of said district court, instead of the *September term*, and who had obtained a change of venue to the county of Monroe, should be and appear at the next term of the district court for Monroe county, and not depart without leave of the court; which said bond was duly taken and approved, and remains of record; and that at the said next ensuing term of the district court for Monroe county, the said A. T. S. not appearing, according to his said recognizance, to answer to said indictment, when solemnly called, but wholly neglecting and refusing so to do, his default was entered of record, and his said recognizance forfeited; and where T. L. S., the only defendant served, appeared and answered, denying the truth of the matters set out in the *scire facias*; that there was any such record as was averred; that there was any mistake in the recital of the recognizance, as to the term of the court at which the indictment was found; and that the said T. L. S. ever became the surety of the said A. T. S. upon any bond to appear and answer any indictment, except the one found and presented by the grand jury of Marion county, at the April term, 1855—upon which answer issue was joined; and where the cause was submitted to the court upon the record and evidence, and was taken under advisement, to be decided in vacation; and where, in vacation, the court decided that the said T. L. S. had failed to show cause, and rendered judgment against him for the amount of the recognizance, and costs; *Held*, That there was no error in the record. *The State v. Strong*, 72.

2. A plaintiff, who voluntarily submits to a non-suit, cannot assign for error, or have reviewed in the appellate court, the rulings and decisions of the court below. *Marsh v. Graham*, 76.

3. In an appeal from a justice of the peace, the appellee, on the third day of the term, moved for an affirmance of the judgment before the justice, under the sixty-ninth rule of practice in the first judicial district, which rule provides: "That on filing the papers of an appeal in civil suits, by a justice of the peace, with the clerk of the court, it shall be the duty of the clerk to indorse the time of filing, and docket the same, although the appellant may fail to pay the docket fee required by law; and should not such fee be paid or secured by noon of the second day of the term, the appellee, upon motion, shall have the judgment below affirmed, with costs," which motion was sustained, and the judgment affirmed. On the fifth day of the term, the appellant filed a motion to set aside the order of affirmance, and set down the cause for trial, which motion was supported by an affidavit, alleging that before the term of the court, the appellant was taken sick, and was confined to his bed until after the commencement of the term; that he was unable to attend to the payment or securing of said fees; that if he had been able to attend to the business, they would have been paid before the commencement of the term; and that he had a meritorious defense to the suit, which motion was overruled. At the time of the affirmance of the judgment, the attorney of the appellant was in court, and made no objection; *Held*, That there was no error in the decision of the court. *McManus v. Humes*, 159.

4. A motion to strike from a pleading redundant or irrelevant matter,

is a matter within the discretion of the court; and the overruling such a motion is not a ground of error. *Abbott v. Striblen*, 191.

5. It is no ground of error that the district court has modified, or added explanations, to instructions asked for by a party; but if the instructions as modified or explained, do not express the law, they are subject to review. *Ib.*

6. Where it is assigned for error that the court erred in imposing terms in allowing an amendment of the pleadings, the party complaining must show that the court below abused the discretion properly given to it in such cases. *Hall v. Doran*, 438.

7. A court need not adopt the language of counsel, in charging the jury. It may put aside the instructions asked, and charge the jury in its own language; and the party can only assign for error the incorrect ruling of the court upon the law. *Rusch v. The City of Davenport*, 443.

8. Where the defendants in an action, filed a motion that W. be required to show his authority for appearing as the attorney for complainant, which motion was supported by an affidavit of one of the defendants, stating that he had employed said W. as an attorney in the defense of said cause; and that he had undertaken to act in that capacity, representing that he had no engagement to conflict with such undertaking; and where the said W., filed an affidavit, stating that in October previous, one of the defendants had expressed a desire to retain him; that he was then in no manner employed in the cause; that he was then willing to be engaged on the part of the defendants; that afterwards another of said defendants informed him that this retainer was without authority, and it was their, (defendants') wish that he should retire from the cause; that he had no professional consultation with any one in making up the pleadings; that he never received any fee from the defendants, and considered himself entirely discharged; that in February or March after this, he was employed by the attorney of record for complainant, to appear for them; and that he had their written authority to that effect; and where the court sustained the motion, and required the said W. to show his authority to appear; *Held*, That there was no error in the proceeding. *The State, ex rel. The Attorney General v. Tilghman et al.*, 496.

9. It is not error for a justice of the peace to allow the jurat to a petition in replevin, to be amended so as to show that it was sworn to, and then to overrule a motion, made previously, to dismiss the suit, because the petition was not sworn to. *Hoover v. Rhoads*, 505.

10. Where in an action the defendant pleaded in abatement another action pending in the Warren district court, upon the same promises set forth in the petition, to which the plaintiffs replied, averring *that since the commencement of the present action*, the said plaintiffs had dismissed the suit in defendant's plea mentioned, to which there was no rejoinder; and where it appeared from the record, that the cause was submitted to the court upon the issues, and that it was ordered that the plea in abatement be sustained, and the suit dismissed; *Held*, That there was no error in the decision of the district court. *Rawson v. Guiberson*, 507.

11. Where in an action on a promissory note, the defendant objected to the admission of the note in evidence, upon the ground of an alleged variance between the date of the indorsement of the note and that of the copy attached to the petition; and where the court, being unable to determine, on account of the peculiar manner in which the figures were made, submitted the question of variance to the jury, under proper instructions; *Held*, That the proceeding was not erroneous. *Partridge v. Patterson*, 514.

12. Where in an action on a joint promissory note, the plaintiff offered in evidence a note signed by the defendants, to the introduction of which they objected, on the ground that the copy of the note appended to the petition was signed by one of the defendants only; and where the plaintiff asked leave to amend the petition, so far as to affix the name of the other defendant to the copy of the note, in support of which application, one of the attorneys stated professionally, that he had seen the name of the said defendant on the said copy of said note; and where the court being of the opinion that the name of said defendant had been worn off the said copy of said note, by the frequent handling of the papers, permitted the amendment to be made, and admitted the original note in evidence; *Held*, That the proceeding was not erroneous. *Stephens v. Campbell*, 538.

13. It is not error to expunge from an answer, matter of which a part is scandalous, and all is redundant and irrelevant. *Speers v. Fortner*, 558.

14. The supreme court will not presume a state of facts in order to find error, but every presumption is in favor of the ruling in the court below. *Ib.*

EVIDENCE.

1. Where it is sought to reverse a judgment, on the ground that the verdict is excessive, and contrary to the evidence, the whole of the testimony must be brought before the appellate court, or the objections arising from the finding of the jury cannot be considered. *Nutter v. Rickets*, 92.

2. Where in an action of right, the plaintiff, for the purpose of proving title in D. S., as heir of A. S., offered in evidence an exemplification of the records of the surrogate's court of the county and State of New York, which contained a renunciation of their right to administer upon the estate of A. S., deceased, signed by D. S., the father, and E. S., and others, the brothers of the said A. S., and a petition for letters of administration on said estate by one J. B. S., and the granting thereof by the said surrogate court; and where the defendant objected to the admission of said exemplification, as evidence of the death of said A. S., and of the heirship of his estate by the said D. S., which objection was overruled by the court and the evidence admitted; *Held*, That the court erred in admitting the evidence.

3. In an action against a justice of the peace for wrongfully issuing an execution, a copy of the execution issued by him, with a copy of the constable's return indorsed thereon, certified by the defendant to be a true copy, may be offered in evidence by the plaintiff, without producing the original execution or accounting for its absence. *Dupont v. Downing*, 172.

4. In an action against a justice of the peace for wrongfully issuing an execution, when one of the issues to be determined is, whether the defendant issued the execution without lawful authority, the docket of the defendant as a justice of the peace, may be offered in evidence by the plaintiff, for the purpose of showing, negatively, that no judgment had been rendered against the plaintiff, by the defendant, as justice of the peace. *Ib.*

5. In an action on a replevin bond, for the non-return of property, as awarded, the petition and other papers in the replevin suit, are competent evidence to sustain the suit on the part of the plaintiff. *McGinnis v. Hart et al.*, 204.

6. Where on the trial of an indictment, in which the defendant was charged with the murder of his wife, committed by means of strychnine,

the State introduced two witnesses, one of whom testified to certain improper conduct between the prisoner and a female named F., prior to the death of the wife, and on the day of the burial—and the other testified, that after the death of the wife, and when the prisoner was in jail, he asked him if he did not get arsenic to kill the rats, to which the prisoner answered that he did; that witness then asked him, “where?” to which the prisoner replied, “it is none of your business”—which evidence was objected to by the defendant, but admitted by the court; *Held*, That the evidence was properly admitted. *The State v. Henkle*, 380.

7. Where evidence *tends* to prove the issue, or forms a link in the chain of proof, however slight or remote may be its bearing, it is admissible. So, when material, evidence as to the knowledge and intent, or motive of a party, is always admissible. *Id.*

8. Where in an action of replevin, the plaintiff claimed the goods by virtue of a purchase from one G. C., and on the trial offered in evidence a bill of sale from the said G. C., acknowledged and recorded, but which acknowledgment was defective, which bill of sale was objected to, and ruled from the jury by the court; and where the plaintiff then called as a witness, the said G. C., who testified that he sold the goods to plaintiff, receiving a considerable portion of the purchase money down, and plaintiff's note for the balance; that the plaintiff then took possession, and he (the witness), left the store; that plaintiff owned the store-house in which the goods were kept, both before and since the sale; that afterwards the plaintiff employed the witness to sell the goods for him, under which agreement witness went into the store, and was so selling them when they were taken; and that he then notified the defendant, that he, (witness), had no interest in them, but that they were owned by the said plaintiff; and where the court at this stage of proceeding, on motion of the defendant, directed that the plaintiff be non-suited; *Held*, 1. That the court erred in excluding the bill of sale from the jury; 2. That the court erred in rendering judgment of non-suit against the plaintiff. *Crawford v. Burton*, 476.

9. Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written contract. *Walner & Bro's. v. Manning, Com'r, &c.*, 519.

10. Where the plaintiffs brought an action for the recovery of damages, under a written contract with the Board of Public Works of the State of Iowa, for the erection of the lock and dam at Belfast, on Section No. 13 of the Des Moines River Improvements, and aver in their petition, that in compliance with the contract, they commenced the erection of said lock and dam; and that they were prosecuting the work with all convenient speed, when in the month of April, 1857, the Board of Public Works ordered the work to be stopped, and refused to execute the said contract, and prevented the said plaintiffs from completing the same; and where upon the trial the plaintiffs introduced the contract and specifications, and gave evidence tending to prove the actual cost to the plaintiffs, when completed, of the “masonry laid in lock-wall, of cut stone and range-work,” and thereupon the defendant introduced G. W. as a witness, who testified that he was the chief engineer of the Des Moines River Improvements at the time, and as such, made with the plaintiffs the contract sued on; that nothing was said when the contract was made, as to the construction of the specifications in regard to the cut stone and range-work masonry in the lock wall; that one of the plaintiffs was interested in the contract for building the lock and dam at Croton, six miles above Belfast, which had been in process of erection during the year 1848, &c., and which was not

completed, when the contract sued on was executed; that dams had been partly erected by other contractors at Farmington, &c.; that the specifications referred to were printed and published before the letting of contracts in 1848; that they were generally attached to contracts entered into; that the specifications in relation to "masonry in lock walls," was not susceptible of any misconstruction or misunderstanding; that the witness believed that the plaintiffs understood that the "lock walls, range and course-work," were not to be done as specified; that the specifications referred to were a part of the contract; that at the time the contract was made, the terms of the contract were not intended by the parties to be understood in a different sense from that expressed upon its face; and where the plaintiffs, on cross-examination proposed to prove by the same witness, the following facts: 1. The character of the "masonry in lock walls, cut stone, and range work," done upon the locks at Croton, &c., under similar specifications, and under the direction of the State Engineer; 2. That the work to be done by them was to be of the same quality as the work on the lock at Croton, then in process of erection; 3. That the plaintiffs understood from the contract, that the "cut stone, course or range-work," to be done by them, was to be different from the work described in the specifications; and, 4. That the State Engineer, who made the contract, and the plaintiffs, both understood from it, that the "cut stone, course, or range work," was to be done in a different manner from that described in the specifications—to which evidence the defendant objected, and the same was excluded by the court; *Held*, 1. That the evidence was not admissible under section 2401 of the Code; 2. That the evidence was properly excluded. *Ib.*

11. The recording act of this State has no reference to patents for land issued by the United States; and a copy of such a patent contained in the record books of a county, is not admissible in evidence under section 1228 of the Code; and were it so admissible, there should be some evidence accounting for the absence of the original patent, and the record books should be proved. *Curtis v. Hunting*, 586.

EXECUTION.

1. A judgment in favor of the State of Iowa, will not authorize an execution in favor of an individual. *Dupont v. Downing*, 172.

2. A plaintiff, by merely charging the defendant with having wrongfully issued an execution, cannot cast upon him the burden of producing the judgment to support it. The plaintiff must first make out a *prima facie* case against the defendant. before he can call upon the latter to disprove the charge against him. *Ib.*

EXECUTOR.

1. A widow cannot settle the estate of her husband, and make distribution and appropriation, as to her seems right; nor can she, with the assets of the estate, purchase real estate, taking the title to herself, and make the property her own; and by so doing, she becomes an executor *de son tort*. *Schaffner et al. v. Grutzmacher et al*, 187.

2. Where a widow assumes to administer upon the estate of her husband, without legal authority, and has made herself an executor *de son tort*, she cannot take credit for that which, under a legal administration, would have been her own. *Ib.*

3. In proceedings against an administrator or executor, to prove up a claim against an estate, no judgment—in the sense in which the term is ordinarily used—should be rendered. *Voorhies & Co. v. Eubank, Ex.*, 274.

4. The object of the proceeding is to ascertain the truth and justice of the claim made against the estate; and when so ascertained, it is to be allowed, and ordered to be paid from the assets of the estate. *Ib.*

5. In proceedings to prove up a claim against an estate, the executor or administrator, and not the estate, should be made party defendant. No judgment or adjudication can be rendered against the estate as defendant, as against a natural person. *Ib.*

6. Where a judgment is rendered against an executor or administrator, it should be against him in his official capacity, to be levied of the goods and chattels of the deceased, in his hands to be administered. *Ib.*

7. In proceedings against an executor or administrator, to prove up a claim against an estate, no order should be entered for the issuing of an execution. *Ib.*

8. Where in proceedings against an executor, to prove up a claim against an estate, appealed to the district court, the said court, on motion of the appellee, affirmed the judgment of the court below, for the reason that the appellant had failed to prosecute the appeal, and rendered judgment as follows: "That the said plaintiffs recover of Martha E. Eubank, late Martha E. Carey, executrix of the estate of S. T. Carey, deceased, the sum of two thousand and fifty-six dollars and ninety-five cents, and that execution issue on the judgment;" *Held*, That the judgment was erroneous. *Ib.*

EXEMPTION.

1. Where personal property is left with a widow, as the head of a family, and exempt from administration, under section 1329 of the Code, she does not become the absolute owner of the property thus appropriated. *Schaffner et al. v. Grutzmacher et al.*, 187.

EXPERT.

1. The means of knowledge of an expert, are proper to be considered by a jury, and they should give or withhold credence in the opinion given, as they may believe the expert qualified to speak more or less intelligently and understandingly. *The State of Iowa v. Hinkle.*, 380.

2. Where two physicians, S. and F., were called as experts, to testify as to the tests applied in the chemical analysis made of the stomach of the deceased, and of the tests usually applied for detecting the existence of poison in such cases, and one of them stated that he was not a professional chemist, but understood some of the practical details of chemistry; that portion, at least, which pertained to his profession; that he had no practical experience in the analysis of poisons, until, in connection with F., he analysed the contents of the stomach of the deceased; that since that time, he had conducted experiments on a small scale; and that he was previously acquainted with the means of detecting poisons, and had since had some experience in that way; and where the other testified that he was not a practical chemist; that he did not follow the science as a profession; that he understood the chemical tests by which the presence of strychnine can be detected; that he professed to understand the principles of chemistry as taught in the books on that science; that he never experimented with a view to detect strychnine by chemical tests; that he had seen experiments by professors of chemistry; and that there was one test much relied on, the trial of which he had witnessed; and where the witnesses were objected to as incompetent, for want of the requisite professional skill, which objection was overruled; *Held*, That the witnesses were competent. *Ib.*

FORMER ADJUDICATION.

1. Where a party pleads a former adjudication of the matter in controversy, he should bring into court, and make proof of, an exemplification or transcript of the former cause, and thus make it a part of his case. *Campbell v. Ayres*, 339.

2. If he does not do so, his adversary may take exception to the pleadings, but he is not obliged to do so. *Ib.*

3. Where on an issue of a former adjudication, a certified copy of a judgment is offered in evidence, it will be insufficient, without the petition and pleadings upon which it was rendered. *Ib.*

GARNISHEE.

1. The facts stated in the answer of a garnishee, when not controverted, are to be taken as true. *Meeker v. Sanders*, 61.

2. Where two persons were garnished, and in their answer one of them professed to hold the property, &c., in his hands, under an assignment of the judgment debtor, for the benefit of creditors; and where the answer, as to the other garnishee, alleged that his name, as assignee, was left out of the assignment by mistake, and that he had been acting under the orders and control of the assignee whose name was inserted in the deed, which answer was not denied; and where the court rendered judgment against both the garnishees for the amount of the judgment against the principal debtor; *Held*, 1. That the proceedings against the garnishee whose name was omitted from the assignment, and who was acting under the assignee, should have been dismissed; 2. That the judgment against the assignees was erroneous. *Ib.*

GRAND JURY.

1. It is only where a grand juror has formed or expressed an *unqualified* opinion, that the defendant is guilty of the offense for which he is held to answer, that he is disqualified from serving, if objected to on that ground, under section 2384 of the Code. *The State of Iowa v. Hinkle*, 380.

2. Where a party held to answer for a criminal offense, at the time of empanneling the grand jury, asked a juror whether he had not formed or expressed an opinion as to his guilt, to which the juror answered that he had, and thereupon the juror was challenged as incompetent; and where the court then asked the juror, whether he had formed or expressed an *unqualified* opinion of the guilt of the defendant, to which the juror answered that he had not—that his opinion was based upon rumor, upon which the challenge was overruled; *Held*, That the juror was not disqualified. *Ib.*

3. Where a party has been held to answer for a criminal offense, he cannot, after indictment found, object to the manner in which the grand jury had been selected and drawn. *Ib.*

4. After the taking effect of the new constitution of the State of Iowa, a grand jury had no legal authority to inquire into offenses less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days. *The State of Iowa v. Kahler*, 398.

GUARANTOR.

1. In an action against the guarantor of a promissory note, where the guarantee is written on the back of the note, the plaintiff is not required to prove the signature of the guarantor, unless the same is denied under oath. *Partridge v. Patterson*, 514.

GUARDIAN AND WARD.

1. F was the administrator of the estate of L., deceased, and also the guardian of his minor children, six in number. Upon a settlement of his accounts before the county court, there was found to be due F., from the said estate, the sum of \$26,40, for which a judgment was rendered in his favor by the county court, and there was found to be in his hands of the estate of his wards, and due to them, a certain sum to each. From the decision of the county court, upon the accounts of F., as administrator and guardian, the heirs appealed to the district court, in which the accounts were referred to a commissioner, to restate the same, and report to said court. The commissioner reported that there was due to F., as administrator, from the estate, \$10,68, and that a certain sum was due to each heir, on the 20th of September, 1855, from said F., making a total of \$1766,51. Both parties excepted to the report of the commissioner, but they were overruled. The district court confirmed the report, ordered interest to be allowed on the amount reported to be due to the heirs from F., from the date of the filing of the report to the time of its acceptance by the court; and, adding the several amounts together, including the sum due one of the heirs, who had deceased, rendered judgment against F., in favor of "The Heirs of L.," for \$2,079,15. *Held*. 1. That the accounts of F., as administrator, and as guardian, could not be treated as a whole, and that they could not be taken to the district court, nor brought to the supreme court, by one and the same proceeding, in the nature of an appeal; 2. That no judgment could be properly rendered in favor of the heirs, by the name of "The Heirs of L.;" 3. That in such a proceeding neither the county court, nor the district court, was authorized to render a judgment against F., either as guardian, or as administrator. *Foteaux v. Lepage et al.*, 123.

2. Where the same person is administrator of an estate, and also guardian of the minor heirs of the intestate, his account as administrator is distinct from his account as guardian; and his account as guardian of each one of the heirs, is distinct from that of all the others. The county court is required to consider each account separately, and to render a distinct adjudication upon each; and it is from such decision that an appeal must be taken, and not one appeal from the whole. *Id.*

3. Each one of the heirs is entitled to have his portion of his ancestor's estate kept to itself, and to require his guardian to render a distinct account in relation to it. If a judgment is to be rendered against the guardian, it should be for such sum, to be ascertained by the court, as each heir may be entitled to, and not a judgment for the whole amount in his hands, due to all the heirs. *Id.*

4. A proceeding before the county court, to require an administrator or guardian, to make a settlement of his account, and to ascertain the situation of the estate of which he is administrator or guardian, is in no sense a proceeding to recover a judgment against the administrator or guardian, for the money received by him, or remaining in his hands. *Id.*

5. In such case, neither the county court, nor the district court, is authorized to render any judgment against the party. All that it is empowered to do, is to ascertain the state of the accounts, as such administrator or guardian, in order that, when so ascertained, the parties interested may take such further steps as they may deem expedient. *Id.*

6. The account of an administrator or guardian, should be rendered under oath. *Id.*

7. Where a ward is of an age to earn his own livelihood, and the income of his estate is not sufficient for his nurture and education, the ward must

either be bound out as an apprentice to learn a trade, or application must be made to the court of probate, for permission to encroach upon the principal of the estate. *Ib.*

8. As a general rule, the expenses of the ward must be kept within the income of his estate. *Ib.*

9. The rents and profits of the real estate, and next the interest of the ward's money, are to be first resorted to, for his nurture and education; and the guardian will not be permitted, without an order of the probate court to that effect, to encroach upon the principal sum of the ward's estate. *Ib.*

10. Where in the settlement of a guardian's account, it appeared that at the time of the appointment, one of the wards was sixteen, and the other fourteen years of age; that one of them was in the employ of his guardian, rendering him service, and was capable of earning his food and clothing; that each was charged with their board at the rate of sixty dollars per annum, for two years after the time of the appointment of the guardian; that they were not allowed anything for their labor or services to the guardian; that the guardian had not only expended upon the wards, the rents and profits of the real estate, and the interest of their money, but had also expended largely of the principal; that the amount reported by the guardian, as having been expended in the education of the wards, from 1842 to 1858, was \$21 24; and that during a period of ten years, no settlement of the guardian's accounts had been made; and where it was not shown that the guardian was authorized by any order of the probate court to encroach upon the principal of the estate, and thereupon the charge against the heirs for board, was rejected; *Held*, That the claim was properly rejected. *Ib.*

11. Where a commissioner appointed to state an account of a guardian made yearly rests, and compounded the interest annual'y; *Held*, That the account was properly stated. *Foteux v. Lepage et al.*, 128.

12. Where it is shown that a guardian has made more than the legal rate of interest, out of the money or property of the ward, he will be charged with all that he has made out of the estate. Where nothing is shown, he will be charged with the highest rate fixed by law. *Ib.*

13. Where a guardian has been careless and negligent in the discharge of his duty, and in the custody of the estate of the ward, the court will be justified in withholding any compensation. *Ib.*

14. The amount of indebtedness from the guardian to the ward, should, in no case, be allowed to fall below the principal sum coming to his hands; and no credit claimed, or payments made by him, should be allowed him in his account, which encroach upon the principal of the ward's estate, unless such encroachment is shown to have been first directed by the court of probate. *Ib.*

15. The guardian must produce vouchers for all expenditures made by him; and where this cannot be done, proof of the payment or expenditure, must be given by his own oath, or by other sufficient testimony. *Ib.*

HABEAS CORPUS.

1. After conviction of a criminal offense, by a court having jurisdiction, though the conviction may be irregular or erroneous, the party is not entitled to a writ of *habeas corpus*. *Platt v. Harrison, Sheriff*, 79.

2. The judgment and proceedings of a competent court cannot be revised in another court, upon *habeas corpus*. *Ib.*

4. Where a party convicted of a criminal offense, has a perfect, well

defined, and complete remedy, in the regular and usual method of appeal he is not entitled to a writ of *habeas corpus*. *Ib.*

4. Chapter 127 of the Code, which regulates the writ of *habeas corpus*, refers to preliminary examinations, to ascertain whether an offense has been committed, and where the defendant has been committed to answer, before the district court, for an offense charged. *Ib.*

5. Where a party was found guilty of the offense of selling goods at auction, within the corporate limits of a city, without having obtained a license, as required by an ordinance of the city council, before the police magistrate of the city, and in default of payment of the fine imposed, was placed in the custody of the sheriff of the county, under a proper mittimus; and where, while thus detained in custody, he sued out from the district court, a writ of *habeas corpus*, upon the ground that the city council had no power, under the city charter, to pass the ordinance, and that the same was null and void; and where, on the hearing, the defendant was discharged by the district court; *Held*, That the district court had no power or authority to examine into the legality or regularity of the conviction before the police magistrate, under a writ of *habeas corpus*. *Ib.*

HEIR.

1. Where a party claims as heir, he must first establish affirmatively, his relationship with the deceased; and secondly, negatively, that no other descendant exists to impede the descent to him. *Anson v. Stein*, 150.

2. Where in an action of right, the plaintiff, for the purpose of proving title in D. S., as heir of A. S., offered in evidence an exemplification of the records of the surrogate's court of the county and State of New York, which contained a renunciation of their right to administer upon the estate of A. S., deceased, signed by D. S., the father, and E. S., and others, the brothers of the said A. S., and a petition for letters of administration on said estate by one J. C. S., and the granting thereof by the said surrogate court; and where the defendant objected to the admission of said exemplification, as evidence of the death of said A. S., and of the heirship of his estate by the said D. S., which objection was overruled by the court, and the evidence admitted; *Held*, That the court erred in admitting the evidence. *Ib.*

HIGHWAY.

1. The term bridge embraces every structure in the nature of a bridge, over any obstruction to the highway, whether a river, ditch, or other passage for water. *Rusch v. The City of Davenport*, 448.

2. Although a road district may not be obliged to keep the whole of a highway, from one boundary to another, free from obstructions, and fit for the use of travelers, yet as convenience and safety are the essential conditions of a well-maintained highway, both at common law, and by statute, if a bridge is built of greater width than is required by the statute, where the exigencies of travel seem to require it, it must be kept in good condition for its whole width. *Ib.*

3. Where a city digs a ditch, and covers it at the street crossing with boards for the whole width of the street, it is the duty of the city to keep it in a suitable condition for crossing upon any part of it. *Ib.*

HOMESTEAD.

1. Where a husband and wife mortgage a homestead to secure the payment of a partnership debt, of which firm the husband is a member, and

subsequently to the execution of the mortgage, the said firm makes an assignment for the benefit of their creditors, the mortgagee is entitled to a *pro rata* share of the proceeds of the assets of the partnership in the hands of the assignee, and the homestead is only liable for the deficiency. *Dickson et al. v. Chorn et al.*, 19.

2. The mortgaging of the homestead by the husband and wife, to secure a partnership debt—the husband being a member of the co-partnership—and which co-partnership subsequently to the execution of the mortgage, makes an assignment for the benefit of creditors, does not give to the other creditors of the partnership, a right to make liable to their debts the homestead so mortgaged; nor does the *bona fide* release of the mortgaged premises by the mortgagee, and his receipt of a *pro rata* share of the proceeds of the partnership assets, entitle the other partnership creditors, to be subrogated to the rights of the mortgagee under the mortgage. *Ib.*

3. Where parties to a suit in equity, and especially the complainant, gives to the property in controversy the name of the homestead, and treat it as such, by which its character is clearly shown, it is not necessary for the respondents, to aver or allege that it was actually used as a home. *Ib.*

4. Where a party claims a homestead in lands used for agricultural purposes, under the act entitled "An act to exempt a homestead from forced sale," approved January 15, 1849, he must allege and show that the homestead claimed, does not exceed the forty acres given by the statute; that it is not included in the recorded plat of a city, town, or village; and that it does not exceed five hundred dollars in value. *Helfenstein & Gore v. Cave*, 874. ✓

5. In a plea of homestead, under the homestead act of 1849, it is not necessary to allege that the defendant notified the officer, at the time of making a levy upon the land, of what he regarded as a homestead, or that he claimed such homestead. *Ib.*

6. In an action of right, where the defendant claims the premises as his homestead, under the homestead act of 1849, the defendant may plead that the premises are susceptible of a division, so that a portion, including the dwelling house and buildings appurtenances thereto, may be set off in such manner that the homestead will not exceed the sum of five hundred dollars; and in such a plea, it is not necessary to set out new limits to the homestead, in order to bring it down to the necessary value. *Ib.*

7. Under such a plea of homestead, it is incumbent upon the plaintiff, either to deny that the premises are divisible, or to call for a survey of the premises, and the ascertainment of a quantity of the land, to meet the required value. *Ib.*

HUSBAND AND WIFE.

1. An administrator of a deceased husband cannot maintain an action of replevin against the vendee of the widow, or those claiming under her, for the recovery of property of the husband, left with the widow, as the head of the family, and exempt from administration, or as belonging to her distributive share of her husband's estate, after the payment of debts. *Wilmington, Adm'r v. Sutton*, 44.

2. Where personal property is left with a widow, as the head of a family, for the benefit of herself and children, she holds it as trustee for the heirs, and either has no power to sell, or if she has, she must be held to account to the children for their interest in the same. *Ib.*

3. If she receives the property as her distributive share of her husband's estate, it becomes her's absolutely, without any obligation to account for its disposition to the children. *Ib.*

4. In neither case, has the administrator of the husband, a shadow of right to the property. *Ib.*

5. A widow cannot settle the estate of her husband, and make distribution and appropriation as to her seems right; nor can she, with the assets of the estate purchase real estate, taking the title to herself, and make the property her own; and by so doing she becomes an executor *de son tort*. *Schaffner et al., v. Grutzmacher et al., 137.*

6. Where personal property is left with a widow, as the head of a family, and exempt from administration, under section 1329 of the Code, she does not become the absolute owner of the property thus appropriated. *Ib.*

7. Although a widow, or an heir, is entitled to a definite portion of an estate, and though this may be well determined, yet neither can put his or her hand into the purse of the deceased, and judge and administer for him or herself. *Ib.*

8. Still less can a widow take that which belongs to herself and others jointly, and which, at her death, would belong to others entirely, and invest it, and call the proceeds exclusively her own. *Ib.*

9. Where a wife unites with her husband in a conveyance in fee simple of the real estate of the husband, she is not bound by the covenants in the deed, nor is such deed a bar to any title subsequently acquired by her. *Ib.*

10. Where a widow assumes to administer upon the estate of her husband, without legal authority, and has made herself an executor *de son tort*, she cannot take credit for that which, under a legal administration, would have been her own. *Ib.*

11. Where in a criminal case, a wife is introduced as a witness in favor of her husband, under section 2391 of the Code, it is error for the court to instruct the jury, that "her testimony, at all events, should be received with great caution." *The State v. Guyer, 263.*

12. In such cases, the testimony of the wife is to be received, and her credibility tested, by the same rules which apply to all other witnesses. *Ib.*

INDORSER AND INDORSEE.

1. Where in an action against the indorser of a promissory note, the defendant asked the court to instruct the jury as follows: "1. That before the indorser of a promissory note is liable for the payment thereof, he must have due notice of its dishonor and protest; 2. That before an indorser can be held liable for the payment of a promissory note, without such note being first duly protested or dishonored, the jury must find that the note was given for the accommodation of the indorsee only, and that he has the sole interest in the payment, and must ultimately pay the same; which instruction the court gave, with the following addition: "This is true; but if the jury find that the indorser waived protest and notice, or, after the day of payment, expressly promised to pay the note, or indorsed and passed it for a valuable consideration, he is liable in this suit;" and where the defendant also asked the court to instruct the jury as follows: "That before the indorser of a note, without notice of its dishonor, can be held liable on a subsequent promise to pay, it must be

shown that he made the promise with a full knowledge of the fact that the note was not duly dishonored"—which instruction was given by the court, with an addition, as follows: "But the jury must take into consideration all the evidence and facts, in order to determine whether the defendant had notice of the note being protested; and if the jury find that defendant, before its maturity, requested that the note might not be put in bank, to avoid a protest, he cannot take advantage of the fact, that it was not duly protested, and that he was not notified;" and where the defendant further asked the court to instruct the jury: "That the law will not infer that an indorser who promises to pay the note after its maturity, had knowledge that it was not duly protested;" which instruction was given with the addition: "But if the jury find that the maker was insolvent, and that the indorser knew and acknowledged that fact, and stated to the plaintiff, that in consequence thereof, it was not necessary to put the note in bank, and make additional costs by protest, &c., he can take no advantage of the want of demand and protest;" and where it appeared that the court, and the counsel of the defendant, treated the instructions as implying that the term "protest and notice," included a *demand* of payment; *Held*, That there was no error in the instructions. *Abbott v. Striblen*, 191.

2. In an action by the indorser against the indorsee of a promissory note not negotiable, it is not necessary for the plaintiff to show diligence against the maker; and the want of such diligence constitutes no defence to the action. *Hall v. Monohan*, 216.

3. In such cases, the indorser stands in the relation of a principal, and not surety, to his indorsee, and has no right to insist on a previous demand of the maker, and notice of non-payment. *Ib.*

INDICTMENT.

1. A defendant's right may be seriously compromised by his being compelled to go to trial upon an indictment charging more than one offense; and the fact that the defendant has pleaded not guilty to the whole indictment, is not sufficient to deprive him of the right to compel the prosecutor to elect on which charge he will proceed to trial. *The State v. Abrahams*, 117.

2. In such a case, the court should permit the defendant to withdraw the plea, for the purpose of filing a motion to direct the prosecutor to elect on which of the offenses charged in the indictment, he will proceed to trial. *Ib.*

3. Where an indictment contained three counts, the first two of which charged that the defendant leased a house, knowing that the lessee intended to use it as a place, or resort, for the purpose of prostitution and lewdness, and the third charged him with letting it in like manner, and knowingly permitting such lessee to use the same for such purpose; *Held*, That the indictment did not charge two distinct offenses. *Ib.*

4. In a criminal case, the State is not confined to the witnesses upon whose testimony the charge is founded, and whose names are indorsed on the indictment. *Ib.*

5. Section 2913 of the Code, which provides that the names of the material witnesses for the State, examined before the grand jury, must be indorsed upon the indictment, is not to be extended beyond its actual provision; and does not go to the extent, that the State cannot introduce witnesses discovered subsequently to the finding of the indictment. *Ib.*

6. Since the taking effect of the new constitution, the offense of selling intoxicating liquors, is not subject to indictment. *The State v. Koehler*, 398.

7. Section 2914 of the Code, which requires that an indictment, when found by the grand jury, and indorsed a "true bill," by the foreman, must be presented to the court by the foreman, in their presence, and marked "filed," by the clerk, is directory merely, and the failure of the clerk to make the indorsement, is not sufficient to invalidate the proceedings. *The State v. Axt*, 511.

8. Where an indictment was properly indorsed by the foreman of the grand jury, and was marked filed by the clerk, but the indorsement of the clerk did not show that it was "presented to the court by the foreman, in the presence of the grand jury;" *Held*, That the requisites prescribed by section 2916 of the Code, sufficiently appeared by the indorsement on the indictment. *Ib*.

9. It is not essential to the validity of an indictment, that it should appear from the indorsement of filing by the clerk, that it was "presented to the court by the foreman, in the presence of the grand jury." *Ib*.

10. Where an indictment charged the defendant with unlawfully selling intoxicating liquors, by the glass or dram, on the first day of September, 1857; *Held*, That the district court had jurisdiction of the offense. *Ib*.

11. Although the time laid in an indictment is not material, and need not be proved as laid, yet where the defendant pleads guilty to the offense alleged, the fact that the State was not confined to the exact time laid in the indictment, and might have proved that the offense was committed at a prior date, cannot operate to uphold the jurisdiction of the district court, not otherwise shown by the record. *The State v. Rollet*, 535.

INFANT.

1. Where a party, at the time of making a deed of real estate, represents himself to be of full age, and the grantee, relying upon such representations, receives the same, the grantor cannot disaffirm the contract on the ground of infancy. *Prouty v. Edgar*, 358.

2. Where a party holds the legal title to real estate in trust for another, who has executed a bond for the conveyance of the same, and received the purchase money, and where the trustee conveys the land in accordance with the requirements of the bond, he cannot set aside the deed, on the ground that he was a minor when the deed was executed; nor for the reason that the bond was obtained from the party holding the beneficial interest in the land, by fraud and duress. *Ib*.

3. In equity, an infant who holds the legal title to land, as trustee, may be compelled to convey the same. *Ib*.

INSTRUCTIONS.

1. The district court is not bound to give or refuse instructions in the form and terms presented by a party, but may modify them so as to meet the views of the court upon the law; or add to such instructions such matter explanatory of them, as the court may deem proper to a right understanding by the jury. *Abbott v. Striblen*, 191.

2. It is the duty of a party to call the attention of the court, to the specific matter in instructions to which objection is made, rather than except in general terms to the entire instructions. *Ib*.

5. It is no ground of error that the district court has modified, or added explanations, to instructions asked for by a party; but if the instructions as modified or explained, do not express the law, they are subject to review. *Ib*.

4. Where nothing is shown to the contrary, the appellate court will presume that an instruction given by the court below, was pertinent to the case. *McGinnis v. Hart et al.*, 204.

5. Where in an action on a replevin bond, the court instructed the jury as follows: 1. That the records of the court show that return of the property was awarded in the former action; 2. That such award of return was still in force, and that unless the defendants have returned the property or paid the value, they are liable; 3. That the petition of the plaintiff in the former suit, and the return of the sheriff, were proper evidence, and the latter conclusive of the facts therein stated, unless contradicted; 4. That if plaintiff proves that his property was replevied by H.—the principal in the replevin bond—and delivered to him, the defendants must prove the property returned, or paid for, or otherwise the verdict would be against them; and, 5. That in order to make a valid replevy, it was not necessary that the sheriff should actually take the property off from the premises of the defendant in the replevin; but if the plaintiff in the replevin was present when the property was replevied, and consented to the manner of the replevy, and the kind of delivery made to him, he cannot now object to the validity of the levy; *Held*, That the instructions were not erroneous. *Ib.*

6. A court need not adopt the language of counsel, in charging the jury. It may put aside the instructions asked, and charge the jury in its own language; and the party can only assign for error, the incorrect ruling of the court upon the law. *Rusch v. The City of Davenport*, 443.

7. Where in an action to recover for materials furnished, and work and labor performed, in the erection of a house, under a written contract, the court charged the jury as follows: "That if the defendant made the first payment in pursuance of the contract, with a full knowledge of the kind of house the building was—if he was present while plaintiff was building the house, and gave his assent to the manner in which plaintiff was building the same—and if he admitted that he was satisfied with the building, when the same was finished, and thereupon took possession, these circumstances tend to prove that the building was finished according to the contract;" *Held*, That the instruction was not erroneous. *Demoss v. Noble*, 530.

8. Where in an action to recover for materials furnished, and work and labor performed, in the erection of a house under a written contract, there was evidence tending to show, that after the house was finished, the plaintiff said to defendant, that if the mortar did not become hard, and make a cement within three months, he would not ask the defendant for the last payment; and where witnesses were introduced, some of whom testified that it did become hard, and others that it did not; and where the court instructed the jury, "that if plaintiff said to defendant he would not call upon him for the last payment, if the cement did not prove to be better, this would not defeat the plaintiff's action, unless the proposition was acceded to by defendant;" *Held*, 1. That there was no objection to the instruction; 2. That the plaintiff was not bound by the promise, for the reason that there was no mutuality. *Ib.*

9. Where it does not appear from the transcript of a cause, that any exception was taken to the instruction complained of, at the time it was given, the appellate court will not inquire whether or not the instruction was erroneous. *Hall v. Denise*, 534.

10. Where a defendant filed a motion for a new trial, for the reason that the court refused to give certain instructions, which instructions were copied into the motion; and where on the motion for a new trial being overruled, the defendant excepted, setting out in his bill the

motion and instructions; and where it was assigned for error, in the supreme court, that the court below erred in refusing to give the instructions asked for by the defendant; *Held*, That it did not appear to the supreme court that such instructions were asked for by the defendant, and refused by the court. *Curtis v. Hunting*, 536.

INTEREST.

1. Where a commissioner appointed to state an account of a guardian, made yearly rests, and compounded the interest annually; *Held*, That the account was properly stated. *Foteux v. Lepage et al.*, 123.

2. Where it is shown that a guardian has made more than the legal rate of interest, out of the money or property of the ward, he will be charged with all that he has made out of the estate. Where nothing is shown, he will be charged with the highest rate fixed by law. *Ib.*

3. Where a petition commenced as follows: "Your petitioner claims of," &c., "one hundred and eighty dollars, which he alleges to be due him from the defendant, and for cause of such claim," and after describing two notes in one count, concluded as follows: "Which said promissory notes are still the property of your petitioner, and that the amount above claimed, is still due thereon. He therefore asks judgment for that amount, with interest and costs;" which petition was filed January 5, 1857, and service had at same time; and where the court rendered judgment against defendant for the sum of \$187.90, at the September term, 1857, with interest thereon at ten per centum per annum; *Held*, 1. That the plaintiff could take judgment for the sum claimed, with interest from the commencement of the action, under the clause in the petition praying judgment for the sum claimed, with interest; 2. That the court erred in rendering judgment for ten per cent. interest per annum. *Butcher v. Brand*, 235.

INTOXICATING LIQUORS.

1. A party who has sold intoxicating liquors in this State, with intent to enable another to violate the act for the suppression of intemperance, approved January 22, 1855, cannot sustain an action of replevin against a sheriff, and attaching creditors of the person to whom the liquors were sold, for the recovery of the possession of such liquors, on the ground that the sale was void, and the right to the possession of the liquors still remained in the vendor. *Marienthal, Lehman & Co. v. Shafer et al.*, 224.

2. Where in an action of replevin, to recover the possession of intoxicating liquors, against the sheriff and the attaching creditors of N., which liquors were sold by the plaintiff to N., with intent to enable him to violate the act for the suppression of intemperance, the court instructed the jury as follows: "That if the jury find that the contract for the sale of the liquors was made in the State of Iowa, to be sold in violation of the law, no right of property ever passed out of plaintiff to N. by reason of such sale; but it remained in plaintiff, and was not subject to the attaching creditors of N.;" and "that if they believed that defendants held through N., as attaching creditors of his, they must find for plaintiff, if they also found that the attachment was made while the liquor law was in force;" *Held*, That the instructions were erroneous. *Ib.*

3. Since the taking effect of the new constitution, the offense of selling intoxicating liquors, is not subject to indictment. *The State v. Koehler*, 398.

4. A contract made in another State, with intent to enable the defendant to sell intoxicating liquors within this State, in violation of the act for the suppression of intemperance, approved January 22, 1855, is opposed to the policy of the State, and cannot be enforced in our courts. *Davis v. Bronson*, 410.

5. Section five of the act for the suppression of intemperance, which provides that "no action of any kind shall be maintained in any court of this State, for intoxicating liquors, or the value thereof, sold in any other State or country, contrary to the laws of said State or country, or with intent to enable any person to violate any provision of this act," is not unconstitutional and void, as operating to impair the obligation of contracts. *Ib.*

6. Where in an action to recover the value of certain intoxicating liquors, the defendant answered, alleging that the said liquors were sold to defendant by plaintiff, in the State of Illinois, in the year 1857, with intent to enable the defendant to violate the statute and laws of the State of Iowa; that the same were shipped from Chicago, directed to defendant at Iowa City, in Johnson county, with the knowledge that the defendant was not the agent of said county, for the sale of intoxicating liquors; that the same were intended to be sold in said county, without authority, and contrary to the statute of Iowa, in such cases made and provided; and that at the time of the sale and shipment aforesaid, the said defendant was not the agent of said county, authorized to sell intoxicating liquors in said State; to which answer a demurrer was filed, and overruled by the court; *Held*, That the demurrer was properly overruled. *Ib.*

JUDGMENT.

1. Where in an action to foreclose a mortgage, it appeared from the return on the original notice, that the defendants demanded a copy of the petition, and required it to be sent to J. S. F., attorney, Keosauqua, Iowa; and where, at the appearance term of the court, it was made to appear, that a copy of the petition had been sent by mail to the residence of defendants, and that defendants had failed to answer, and thereupon a decree *pro confesso* was rendered against them; *Held*. That there was no sufficient service, and the judgment was irregular. *Woodward v. Whitescarver et ux.*, 1.

2. Where the transcript of a record does not disclose the evidence in the court below, the appellate court is bound to presume that the evidence was sufficient to authorize the judgment. *Vredenburg v. Snyder*, 39.

3. In *scire facias* on a judgment, the judgment on its face, imports absolute verity, and cannot be impeached by any matter going behind it; but the defendant may plead matters arising subsequent to the rendition of the judgment sought to be revived. *Ib.*

4. Where a judgment is joint, and one of the defendants is dead, the plaintiff may revive the judgment against the other defendant, without making the personal representatives of the deceased debtor, a party to the proceedings in *scire facias*. *Ib.*

5. In *scire facias* against one of two joint judgment debtors, the other being dead, the failure of the plaintiff to present his claim against the estate of the deceased debtor, and have the same allowed—the estate being amply sufficient for the payment of debts, is no sufficient cause against the issuing of execution on the judgment, against the surviving debtor *Ib.*

6. The owner of a joint judgment against a principal and surety, the principal debtor having died since the rendition of the judgment, is not required to present his claim against the estate of the deceased, and have the same allowed, in order to preserve his remedy against the surety. *Ib.*

7. In *scire facias*, the judgment should be that the plaintiff have execution for the judgment described in the *scire facias*, and his costs. *Ib.*

8. Where the requirements of the statute as to service, are not observed, the defendant is not in court, and any judgment against him is erroneous. *Harmon v. Lee*, 171.

9. A judgment in favor of the State of Iowa, will not authorize an execution in favor of an individual. *Dupont v. Downing*, 172.

10. The judgment on the *scire facias*, where it is sought to revive a judgment in an action of right, is that the plaintiff have execution against the person succeeding to the possession. It is not a judgment of recovery. *Von Puhl et al. v. Rucker et al.*, 187.

11. Upon the failure of an appellant to docket his case, and prosecute his appeal, in proceedings to prove up a claim against an estate, the district court may affirm the judgment of the court below, or may dismiss the appeal, leaving the judgment of the court below to stand. *Voorhies & Co. v. Eubank, Ex.*, 274.

12. Where in proceedings against an executor, to prove up a claim against an estate, appealed to the district court, the said court, on motion of the appellee, affirmed the judgment of the court below, for the reason that the appellant had failed to prosecute the appeal, and rendered judgment as follows: "That the said plaintiffs recover of Martha E. Eubank, late Martha E. Carey, executrix of the estate of S. T. Carey, deceased, the sum of two thousand and fifty-six dollars and ninety-five cents, and that execution issue on the judgment;" *Held*, That the judgment was erroneous. *Ib.*

13. When the decision on the facts rests in the same mind which pronounces the judgment of the law upon the facts, the final judgment of the law is all that need be expressed in the record of the court, unless the court is requested, under 1798 of the Code, to state the facts found and the conclusions thereon, in writing. *Gallinger v. Vale, Adm'r*, 387.

14. A judgment entry as follows: "On this day came plaintiff, by H. H. Rannels, his attorney, and the defendant, by F. Semple, his attorney, and submitted this cause to the court; and the court being fully satisfied in the premises, it is ordered and adjudged that the judgment of the court below be reversed, and the plaintiff pay the costs herein. It is therefore ordered and adjudged that the defendant, John Vale, Executor, &c., have and recover of the plaintiff and his surety, &c., the costs of this suit, taxed at \$——," is sufficiently regular and certain upon its face. *Ib.*

15. Section 1827 of the Code does not apply to all cases in which a judgment by default may have been entered. *Messenger v. Marsh et al.*, 491.

16. The requisitions of section 1827 are to be complied with, where the judgment has been regularly taken, and where the party is really in default. *Ib.*

17. In case of a judgment by default, entered by mistake, or without notice to the party, or rule upon him to answer, the statute does not require an affidavit of merits in order to set aside a default. *Ib.*

18. In any case, where it is apparent that a judgment by default has been hastily and improvidently rendered, and where the facts are within the knowledge of the court, the default may be set aside, without an affidavit of merits. *Ib.*

19. An appeal from a justice of the peace, whether allowed by the justice or the clerk, must be taken and perfected within twenty days from the rendition of the judgment. *McBrearty v. Dyer*, 528.

20. A judgment will not be reversed, unless it is made apparent to the appellate court, that a new trial is necessary in order to correct some injury resulting from the judgment appealed from. *Speers v. Fortner*, 558.

JURISDICTION.

1. After conviction of a criminal offense, by a court having jurisdiction, though the conviction may be irregular or erroneous, the party is not entitled to a writ of *habeas corpus*. *Platt v. Harrison, Sheriff*, 79.

2. Courts of equity exercise a general concurrent jurisdiction with courts of law, in the assignment of dower in all cases. *Phares v. Walters*, 108.

3. Where the jurisdiction is concurrent, courts of equity, equally with courts of law, are bound by the statute of limitations; and they act in obedience to the statute, rather than by way of analogy to the law. *Ib.*

4. If the court rendering a decree has no jurisdiction of the person of the defendant, he will not be bound, and this, whether the court is one of limited or general jurisdiction. And so, if the proceeding is against property, it cannot be condemned, and will not be bound, unless it is properly and legally brought before the court. *Gaylord v. Scarff*, 179.

5. After the rendition of a decree of foreclosure, under a tax deed, where the court is shown to have jurisdiction, the owner is concluded from showing, in a subsequent proceeding, the payment of the taxes prior to the sale. *Ib.*

6. Where an action is commenced by attachment against a non-resident, who is a mortgagee of real estate situated in the State, a levy of the attachment upon the lands so mortgaged to the defendant, will not give the district court of the county in which the lands lie, jurisdiction of the cause. *Courtney v. Carr*, 238.

7. An action against a non-resident defendant, to recover damages for the alleged fraud of the defendant in the sale of real estate situated in Boone county, commenced by attachment in the Boone county district court. The plaintiff had received a warrantee deed of the premises, and executed to the defendant a mortgage to secure the payment of a portion of the purchase money. Two writs of attachment were issued—one directed to the sheriff of Boone county, and the other to the sheriff of Polk. The writ directed to the sheriff of Boone county, was returned served, by attaching the land conveyed to the plaintiff, and on which the defendant held a mortgage. The writ directed to the sheriff of Polk, was served by attaching certain real estate of defendant, situate in that county. There was no service of any kind on the defendant. At the return term, the defendant appeared specially, and moved that the venue in said cause be changed to Polk county, which motion was overruled; *Held*, That the district court of Boone county had no jurisdiction of the cause; and that the court erred in overruling the motion. *Ib.*

8. The proof that a copy of the petition and notice was directed to the defendant, or that his residence is unknown, as required by section 1826 of the Code, is an element of jurisdiction; and if the record does not show that such proof was made, before the default was entered, the decree is void. *McGahan v. Carr*, 381.

9. To sustain a title under a sale for taxes, under a statute authority, in derogation of the common law, every requisite of the statute, having the semblance of benefit to the owner, must be strictly complied with, and the claimant under such a title, must prove that all the requisites of

the law have been complied with ; and unless the steps which the law requires to be taken, have been regularly pursued, the court has no jurisdiction under the statute, to divest a party of his property and vest it in the State, or another person. *Ib.*

10. When a subject matter is legally within the jurisdiction of courts of superior and of general jurisdiction, and the parties appear to have been brought, or to come, within it, a strong presumption of correctness and regularity attends their proceedings, and they are not under the necessity of stating upon their records many facts which a court inferior, and of limited jurisdiction must, or must show in some other way. *Campbell v. Ayres*, 339.

11. To give the district court jurisdiction on appeal from a justice of the peace, it must be shown, either that the appellee had the notice required by the statute, or that he made a voluntary appearance in the district court. *Quillian v. Windsor*, 396.

12. The district court possesses jurisdiction to set aside a certificate of pre-emption, granted by a county judge, under the act entitled "An act to prevent trespass or waste on swamp or other lands in the State of Iowa, and for other purposes," approved January 25, 1855, where the same has been obtained by fraud and misrepresentation. *Rogers v. Vass*, 405.

13. Where an indictment charged the defendant with unlawfully selling intoxicating liquors, by the glass or dram, on the first day of September, 1857 ; *Held*, That the district court had jurisdiction of the offense. *The State v. Axt*, 511.

14. Where an indictment charged the defendant with selling intoxicating liquors by the glass or dram, on the 14th of October, 1857 ; *Held*, That the district court had no jurisdiction of the offense charged, and no legal authority to render judgment against the defendant. *The State v. Rollet*, 585.

15. Although the time laid in an indictment is not material, and need not be proved as laid, yet where the defendant pleads guilty to the offense alleged, the fact that the State was not confined to the exact time laid in the indictment, and might have proved that the offense was committed at a prior date, cannot operate to uphold the jurisdiction of the district court, not otherwise shown by the record. *Ib.*

JURY.

1. There is no objection, in principle, to a jury seeing an object which is the subject of testimony. The practice lies in the discretion of the court. *Nutter v. Ricketts*, 92.

2. Where in an action of trover, for the conversion of two horses, the court permitted the jury, with H., who was the person supposed to have sold one of the horses to plaintiff, to go out and see the horse in the court yard ; and where it did not appear that H. and the jury spoke together, or that any improper circumstance appeared ; *Held*, That there was no impropriety in the proceeding. *Ib.*

3. It is the province of the court and its officers to empanel a jury ; and when a party is asked whether he has any objection to the jury, the question refers to the persons constituting it, and whether he has challenges to make ; and not to the right constitution of the jury in point of numbers. *Cowles v. Buckman & Son*, 161.

4. The law tenders the party a jury for the trial of his cause; and he is not to be charged, as with a fault, if the proper officer has not performed his duty by calling a full jury into the box. *Ib.*

5. Where a cause is tried before, and a verdict rendered by, a panel consisting only of eleven jurors, the defect is fatal, unless it has been waived. *Ib.*

6. It is only where a grand juror has formed or expressed an *unqualified* opinion, that the defendant is guilty of the offense for which he is held to answer, that he is disqualified from serving, if objected to on that ground, under section 2884 of the Code. *The State of Iowa v. Hinkle*, 880.

7. Where a party held to answer for a criminal offense, at the time of empanneling the grand jury, asked a juror whether he had not formed or expressed an opinion as to his guilt, to which the juror answered that he had, and thereupon the juror was challenged as incompetent; and where the court then asked the juror, whether he had formed or expressed an *unqualified* opinion of the guilt of the defendant, to which the juror answered that he had not—that his opinion was based upon rumor, upon which the challenge was overruled; *Held*, That the juror was not disqualified. *Ib.*

8. Where a party has been held to answer for a criminal offense, he cannot, after indictment found, object to the manner in which the grand jury had been selected and drawn. *Ib.*

9. It is not necessary that the verdict of a jury, whether rendered in open court, or sealed up and handed to the clerk, should be signed by the jurors. *Miller v. Mabon*, 456.

10. At the close of a trial, the parties agreed that the jury might seal up their verdict and hand it to the clerk, and thereupon the court adjourned until next morning. During the adjournment, the jury returned and delivered to the clerk their verdict, finding for the plaintiff, but it was not signed by either of the jurors. On the next morning, the verdict was read, and the defendant's counsel objected to the same, because it was not signed by the jurors. The jury was then re-called, in open court, into the box; and again, without objection by either party, retired to sign their verdict. After being out some time, they sent a written statement to the court, signed by all the jurors, to the effect that they could not agree upon a verdict. They were brought into court and asked, if the verdict sealed up by them and delivered to the clerk, was not their verdict at the time, to which several of the jurors replied, and all assented, saying that it was their unanimous verdict, and assented to by all the jurors, at the time it was sealed and delivered to the clerk. The jury was then discharged, and plaintiff moved for judgment on the verdict so sealed and handed to the clerk, which motion was overruled; *Held*, 1. That the plaintiff was entitled to judgment upon the verdict as returned, in the first instance, by the jury; 2. That the jury, after their separation, could not be allowed to say, that it was not their verdict; 3. That the fact that the plaintiff did not object to the jury going out to sign their verdict, did not conclude him from moving for judgment on the original verdict. *Ib.*

11. It is within the discretionary power of a court to refer a question of variance as to the date of a written instrument, which the court is unable to determine, to the jury. *Partridge v. Patterson*, 514.

JUSTICE OF THE PEACE.

1. The fact that an appeal was taken and allowed from a judgment rendered by a justice of the peace, more than ten days before the first term of the district court, after the appeal was taken, and that the jus-

tice failed to return the original papers, with a transcript of the entries on his docket, to the district court, until after said first term had elapsed, constitutes no ground for affirming the judgment of the justice, on motion of the appellee, at a subsequent term. *Holloway v. Baker*, 52.

2. The law does not affix, as a penalty on the appellant, for a failure of the justice to do his duty, that the judgment shall be affirmed.

3. In an action against a justice of the peace for wrongfully issuing an execution, a copy of the execution issued by him, with a copy of the constable's return indorsed thereon, certified by the defendant to be a true copy, may be offered in evidence by the plaintiff, without producing the original execution or accounting for its absence. *Dupont v. Downing*, 172.

4. In an action against a justice of the peace for wrongfully issuing an execution, when one of the issues to be determined is, whether the defendant issued the execution without lawful authority, the docket of the defendant as a justice of the peace, may be offered in evidence by the plaintiff, for the purpose of showing, negatively, that no judgment had been rendered against the plaintiff, by the defendant, as justice of the peace. *Ib.*

5. Where in an action against a justice of the peace for wrongfully issuing an execution, his docket is offered in evidence by the plaintiff, and that fails to show a judgment which would authorize the issuing of the execution against the plaintiff, the burden of proof is changed, and the defendant is required to produce the judgment, if any had been rendered. *Ib.*

6. Where in an action against a justice of the peace for wrongfully issuing an execution, the answer alleged that the execution was issued under the following state of facts: That the defendant was an acting justice of the peace for Johnson county; that the plaintiff was charged before him, on the information of one T. B., with an assault and battery, and being arrested and brought before the defendant for trial, such further proceedings were had, that a judgment was rendered against him, in the name of the State of Iowa, for five dollars and costs of suit; that in issuing execution on said judgment, the defendant by mistake inserted the name of said T. B. as plaintiff, instead of the State of Iowa; that the plaintiff at the time well knew the fact of said mistake, and fraudulently concealed the same, and procured his said property to be levied upon by the constable, and sold on said execution; that the proceeds of the sale have been applied in satisfaction of the judgment aforesaid; and that this, and none other, is the grievance complained of; to which answer was appended a transcript from the docket of defendant, as justice of the peace, showing all the proceedings had before him, on the trial of the information against plaintiff, for the assault and battery on T. B., from which transcript it appeared that the plaintiff pleaded not guilty, and demanded a jury; that the jury heard the evidence and returned a verdict of not guilty; that the defendant, as justice, set the verdict aside; that he then rendered judgment against plaintiff for a fine five dollars and costs; and this is the judgment on which the execution complained of, issued; and where the answer was demurred to, and the demurrer sustained by the court; *Held*, That the demurrer was properly sustained. *Ib.*

7. A justice of the peace possesses no power to set aside the verdict of a jury in a criminal case. *Ib.*

8. Nor has a justice of the peace any authority to try the prisoner himself, after the defendant has demanded a trial by jury, and render a judgment against him for a fine and costs. *Ib.*

9. It is not error for a justice of the peace to allow the jurat to a pe-

tion in replevin, to be amended so as to show that it was sworn to, and then to overrule a motion, made previously, to dismiss the suit, because the petition was not sworn to. *Hoover v. Rhoads*, 505.

JUSTIFICATION.

1. In trespass, where the defendant answers, denying the trespass, as alleged in the plaintiff's petition, and alleging matter in justification, the plea of justification does not confess the trespass, so as to dispense with proof of it on the part of the plaintiff. *Grash v. Sater et al.*, 801.

LEGISLATIVE POWER.

1. Where the legislature possesses the power to authorize an act to be done, it may, by a retrospective act, legalize and declare valid, any informality or irregularity in the exercise of the power thus conferred. *McMillen et al. v. The County Judge, &c.*, 891.

MARSHALING ASSETS.

1. In order to give a creditor the right to marshal assets or securities, it must appear that such assets or securities were liable to the general debts of the debtor. *Dickson et al. v. Chorn et al.*, 19.

MILL DAMS.

1. Under the act entitled "An act authorizing mill dams," approved January 24, 1855, certain facts are to be ascertained by the jury; and when ascertained and reported to the court, their finding or verdict must be deemed as conclusive upon the matters submitted to them, as the verdict of a jury in any other case. *Gammell v. Potter*, 548.

2. Until the verdict of a jury summoned under the act authorizing mill dams is set aside, their ascertainment of damages must be considered conclusive; and if the applicant elects to pay the damages, he is entitled to a license for the erection of the dam, if it is further ascertained by the jury, that no dwelling house, &c., will be overflowed, or injuriously affected by it, and if it further appears to the court that the same is reasonable, and for the public benefit. *Ib.*

3. In answer to a writ of *scire facias*, issued under the fifth section of the act authorizing mill dams, approved January 24, 1855, requiring the party to appear and show cause, &c., a defendant cannot assign as cause against the granting of the license to erect a dam, matters legitimately involved in the question of damages submitted to the jury, and pertinent only on application to set aside the finding of the jury, and award a new inquiry of damages. *Ib.*

4. In answer to a writ of *scire facias*, the defendant may allege and prove, as sufficient cause why a license for the erection of a mill dam should not be granted by the court, facts which tend to show that the same would be unreasonable, or that the dam, if built, would not be for the public benefit. *Ib.*

5. In proceedings under the act entitled "An act authorizing mill dams," approved January 24, 1855, matters that are intended to show improper interference by the plaintiff with the jury, and mistake or misconduct on the part of the jury themselves, in ascertaining the damages, do not amount to the sufficient cause contemplated by section five of the statute, why leave should not be granted to build the dam, but come more properly before the court, on an application to set aside the inquisition and award a new writ of *ad quod damnum*. *Ib.*

7. Section 2914 of the Code, which requires that an indictment, when found by the grand jury, and indorsed a "true bill," by the foreman, must be presented to the court by the foreman, in their presence, and marked "filed," by the clerk, is directory merely, and the failure of the clerk to make the indorsement, is not sufficient to invalidate the proceedings. *The State v. Axt*, 511.

8. Where an indictment was properly indorsed by the foreman of the grand jury, and was marked filed by the clerk, but the indorsement of the clerk did not show that it was "presented to the court by the foreman, in the presence of the grand jury;" *Held*, That the requisites prescribed by section 2916 of the Code, sufficiently appeared by the indorsement on the indictment. *Ib.*

9. It is not essential to the validity of an indictment, that it should appear from the indorsement of filing by the clerk, that it was "presented to the court by the foreman, in the presence of the grand jury." *Ib.*

10. Where an indictment charged the defendant with unlawfully selling intoxicating liquors, by the glass or dram, on the first day of September, 1857; *Held*, That the district court had jurisdiction of the offense. *Ib.*

11. Although the time laid in an indictment is not material, and need not be proved as laid, yet where the defendant pleads guilty to the offense alleged, the fact that the State was not confined to the exact time laid in the indictment, and might have proved that the offense was committed at a prior date, cannot operate to uphold the jurisdiction of the district court, not otherwise shown by the record. *The State v. Rollet*, 535.

INFANT.

1. Where a party, at the time of making a deed of real estate, represents himself to be of full age, and the grantee, relying upon such representations, receives the same, the grantor cannot disaffirm the contract on the ground of infancy. *Prouty v. Edgar*, 358.

2. Where a party holds the legal title to real estate in trust for another, who has executed a bond for the conveyance of the same, and received the purchase money, and where the trustee conveys the land in accordance with the requirements of the bond, he cannot set aside the deed, on the ground that he was a minor when the deed was executed; nor for the reason that the bond was obtained from the party holding the beneficial interest in the land, by fraud and duress. *Ib.*

3. In equity, an infant who holds the legal title to land, as trustee, may be compelled to convey the same. *Ib.*

INSTRUCTIONS.

1. The district court is not bound to give or refuse instructions in the form and terms presented by a party, but may modify them so as to meet the views of the court upon the law; or add to such instructions such matter explanatory of them, as the court may deem proper to a right understanding by the jury. *Abbott v. Stribley*, 191.

2. It is the duty of a party to call the attention of the court, to the specific matter in instructions to which objection is made, rather than except in general terms to the entire instructions. *Ib.*

5. It is no ground of error that the district court has modified, or added explanations, to instructions asked for by a party; but if the instructions as modified or explained, do not express the law, they are subject to review. *Ib.*

4. Where nothing is shown to the contrary, the appellate court will presume that an instruction given by the court below, was pertinent to the case. *McGinnis v. Hart et al.*, 204.

5. Where in an action on a replevin bond, the court instructed the jury as follows: 1. That the records of the court show that return of the property was awarded in the former action; 2. That such award of return was still in force, and that unless the defendants have returned the property or paid the value, they are liable; 3. That the petition of the plaintiff in the former suit, and the return of the sheriff, were proper evidence, and the latter conclusive of the facts therein stated, unless contradicted; 4. That if plaintiff proves that his property was replevied by H.—the principal in the replevin bond—and delivered to him, the defendants must prove the property returned, or paid for, or otherwise the verdict would be against them; and, 5. That in order to make a valid replevy, it was not necessary that the sheriff should actually take the property off from the premises of the defendant in the replevin; but if the plaintiff in the replevin was present when the property was replevied, and consented to the manner of the replevy, and the kind of delivery made to him, he cannot now object to the validity of the levy; *Held*, That the instructions were not erroneous. *Id.*

6. A court need not adopt the language of counsel, in charging the jury. It may put aside the instructions asked, and charge the jury in its own language; and the party can only assign for error, the incorrect ruling of the court upon the law. *Rusch v. The City of Davenport*, 443.

7. Where in an action to recover for materials furnished, and work and labor performed, in the erection of a house, under a written contract, the court charged the jury as follows: "That if the defendant made the first payment in pursuance of the contract, with a full knowledge of the kind of house the building was—if he was present while plaintiff was building the house, and gave his assent to the manner in which plaintiff was building the same—and if he admitted that he was satisfied with the building, when the same was finished, and thereupon took possession, these circumstances tend to prove that the building was finished according to the contract;" *Held*, That the instruction was not erroneous. *Demoss v. Noble*, 530.

8. Where in an action to recover for materials furnished, and work and labor performed, in the erection of a house under a written contract, there was evidence tending to show, that after the house was finished, the plaintiff said to defendant, that if the mortar did not become hard, and make a cement within three months, he would not ask the defendant for the last payment; and where witnesses were introduced, some of whom testified that it did become hard, and others that it did not; and where the court instructed the jury, "that if plaintiff said to defendant he would not call upon him for the last payment, if the cement did not prove to be better, this would not defeat the plaintiff's action, unless the proposition was acceded to by defendant;" *Held*, 1. That there was no objection to the instruction; 2. That the plaintiff was not bound by the promise, for the reason that there was no mutuality. *Id.*

9. Where it does not appear from the transcript of a cause, that any exception was taken to the instruction complained of, at the time it was given, the appellate court will not inquire whether or not the instruction was erroneous. *Hall v. Denise*, 534.

10. Where a defendant filed a motion for a new trial, for the reason that the court refused to give certain instructions, which instructions were copied into the motion; and where on the motion for a new trial being overruled, the defendant excepted, setting out in his bill the

motion and instructions ; and where it was assigned for error, in the supreme court, that the court below erred in refusing to give the instructions asked for by the defendant ; *Held*, That it did not appear to the supreme court that such instructions were asked for by the defendant, and refused by the court. *Curtis v. Hunting*, 536.

INTEREST.

1. Where a commissioner appointed to state an account of a guardian, made yearly rests, and compounded the interest annually ; *Held*, That the account was properly stated. *Foteaux v. Lepage et al.*, 123.

2. Where it is shown that a guardian has made more than the legal rate of interest, out of the money or property of the ward, he will be charged with all that he has made out of the estate. Where nothing is shown, he will be charged with the highest rate fixed by law. *Ib.*

3. Where a petition commenced as follows : " Your petitioner claims of," &c., " one hundred and eighty dollars, which he alleges to be due him from the defendant, and for cause of such claim," and after describing two notes in one count, concluded as follows : " Which said promissory notes are still the property of your petitioner, and that the amount above claimed, is still due thereon. He therefore asks judgment for that amount, with interest and costs ;" which petition was filed January 5, 1857, and service had at same time ; and where the court rendered judgment against defendant for the sum of \$187.90, at the September term, 1857, with interest thereon at ten per centum per annum ; *Held*, 1. That the plaintiff could take judgment for the sum claimed, with interest from the commencement of the action, under the clause in the petition praying judgment for the sum claimed, with interest ; 2. That the court erred in rendering judgment for ten per cent. interest per annum. *Butcher v. Brand*, 285.

INTOXICATING LIQUORS.

1. A party who has sold intoxicating liquors in this State, with intent to enable another to violate the act for the suppression of intemperance, approved January 22, 1855, cannot sustain an action of replevin against a sheriff, and attaching creditors of the person to whom the liquors were sold, for the recovery of the possession of such liquors, on the ground that the sale was void, and the right to the possession of the liquors still remained in the vendor. *Marienthal, Lehman & Co. v. Shafer et al.*, 224.

2. Where in an action of replevin, to recover the possession of intoxicating liquors, against the sheriff and the attaching creditors of N., which liquors were sold by the plaintiff to N., with intent to enable him to violate the act for the suppression of intemperance, the court instructed the jury as follows : " That if the jury find that the contract for the sale of the liquors was made in the State of Iowa, to be sold in violation of the law, no right of property ever passed out of plaintiff to N. by reason of such sale ; but it remained in plaintiff, and was not subject to the attaching creditors of N. ;" and " that if they believed that defendants held through N., as attaching creditors of his, they must find for plaintiff, if they also found that the attachment was made while the liquor law was in force ;" *Held*, That the instructions were erroneous. *Ib.*

3. Since the taking effect of the new constitution, the offense of selling intoxicating liquors, is not subject to indictment. *The State v. Koehler*, 398.

4. A contract made in another State, with intent to enable the defendant to sell intoxicating liquors within this State, in violation of the act for the suppression of intemperance, approved January 22, 1855, is opposed to the policy of the State, and cannot be enforced in our courts. *Davis v. Bronson*, 410.

5. Section five of the act for the suppression of intemperance, which provides that "no action of any kind shall be maintained in any court of this State, for intoxicating liquors, or the value thereof, sold in any other State or country, contrary to the laws of said State or country, or with intent to enable any person to violate any provision of this act," is not unconstitutional and void, as operating to impair the obligation of contracts. *Ib.*

6. Where in an action to recover the value of certain intoxicating liquors, the defendant answered, alleging that the said liquors were sold to defendant by plaintiff, in the State of Illinois, in the year 1857, with intent to enable the defendant to violate the statute and laws of the State of Iowa; that the same were shipped from Chicago, directed to defendant at Iowa City, in Johnson county, with the knowledge that the defendant was not the agent of said county, for the sale of intoxicating liquors; that the same were intended to be sold in said county, without authority, and contrary to the statute of Iowa, in such cases made and provided; and that at the time of the sale and shipment aforesaid, the said defendant was not the agent of said county, authorized to sell intoxicating liquors in said State; to which answer a demurrer was filed, and overruled by the court; *Held*, That the demurrer was properly overruled. *Ib.*

JUDGMENT.

1. Where in an action to foreclose a mortgage, it appeared from the return on the original notice, that the defendants demanded a copy of the petition, and required it to be sent to J. S. F., attorney, Keosauqua, Iowa; and where, at the appearance term of the court, it was made to appear, that a copy of the petition had been sent by mail to the residence of defendants, and that defendants had failed to answer, and thereupon a decree *pro confesso* was rendered against them; *Held*. That there was no sufficient service, and the judgment was irregular. *Woodward v. Whitecarver et ux.*, 1.

2. Where the transcript of a record does not disclose the evidence in the court below, the appellate court is bound to presume that the evidence was sufficient to authorize the judgment. *Vredenburg v. Snyder*, 89.

3. In *scire facias* on a judgment, the judgment on its face, imports absolute verity, and cannot be impeached by any matter going behind it; but the defendant may plead matters arising subsequent to the rendition of the judgment sought to be revived. *Ib.*

4. Where a judgment is joint, and one of the defendants is dead, the plaintiff may revive the judgment against the other defendant, without making the personal representatives of the deceased debtor, a party to the proceedings in *scire facias*. *Ib.*

5. In *scire facias* against one of two joint judgment debtors, the other being dead, the failure of the plaintiff to present his claim against the estate of the deceased debtor, and have the same allowed—the estate being amply sufficient for the payment of debts, is no sufficient cause against the issuing of execution on the judgment, against the surviving debtor *Ib.*

6. The owner of a joint judgment against a principal and surety, the principal debtor having died since the rendition of the judgment, is not required to present his claim against the estate of the deceased, and have the same allowed, in order to preserve his remedy against the surety. *Ib.*

7. In *scire facias*, the judgment should be that the plaintiff have execution for the judgment described in the *scire facias*, and his costs. *Ib.*

8. Where the requirements of the statute as to service, are not observed, the defendant is not in court, and any judgment against him is erroneous. *Harmon v. Lee*, 171.

9. A judgment in favor of the State of Iowa, will not authorize an execution in favor of an individual. *Dupont v. Downing*, 172.

10. The judgment on the *scire facias*, where it is sought to revive a judgment in an action of right, is that the plaintiff have execution against the person succeeding to the possession. It is not a judgment of recovery. *Von Puhl et al. v. Rucker et al.*, 187.

11. Upon the failure of an appellant to docket his case, and prosecute his appeal, in proceedings to prove up a claim against an estate, the district court may affirm the judgment of the court below, or may dismiss the appeal, leaving the judgment of the court below to stand. *Voorhies & Co. v. Eubank, Ex.*, 274.

12. Where in proceedings against an executor, to prove up a claim against an estate, appealed to the district court, the said court, on motion of the appellee, affirmed the judgment of the court below, for the reason that the appellant had failed to prosecute the appeal, and rendered judgment as follows: "That the said plaintiffs recover of Martha E. Eubank, late Martha E. Carey, executrix of the estate of S. T. Carey, deceased, the sum of two thousand and fifty-six dollars and ninety-five cents, and that execution issue on the judgment;" *Held*, That the judgment was erroneous. *Ib.*

13. When the decision on the facts rests in the same mind which pronounces the judgment of the law upon the facts, the final judgment of the law is all that need be expressed in the record of the court, unless the court is requested, under 1793 of the Code, to state the facts found and the conclusions thereon, in writing. *Gallinger v. Vale, Adm'r*, 387.

14. A judgment entry as follows: "On this day came plaintiff, by H. H. Rannels, his attorney, and the defendant, by F. Semple, his attorney, and submitted this cause to the court; and the court being fully satisfied in the premises, it is ordered and adjudged that the judgment of the court below be reversed, and the plaintiff pay the costs herein. It is therefore ordered and adjudged that the defendant, John Vale, Executor, &c., have and recover of the plaintiff and his surety, &c., the costs of this suit, taxed at \$———," is sufficiently regular and certain upon its face. *Ib.*

15. Section 1827 of the Code does not apply to all cases in which a judgment by default may have been entered. *Messenger v. Marsh et al.*, 491.

16. The requisitions of section 1827 are to be complied with, where the judgment has been regularly taken, and where the party is really in default. *Ib.*

17. In case of a judgment by default, entered by mistake, or without notice to the party, or rule upon him to answer, the statute does not require an affidavit of merits in order to set aside a default. *Ib.*

18. In any case, where it is apparent that a judgment by default has been hastily and improvidently rendered, and where the facts are within the knowledge of the court, the default may be set aside, without an affidavit of merits. *Ib.*

19. An appeal from a justice of the peace, whether allowed by the justice or the clerk, must be taken and perfected within twenty days from the rendition of the judgment. *McBrearty v. Dyer*, 528.

20. A judgment will not be reversed, unless it is made apparent to the appellate court, that a new trial is necessary in order to correct some injury resulting from the judgment appealed from. *Speers v. Fortner*, 553.

JURISDICTION.

1. After conviction of a criminal offense, by a court having jurisdiction, though the conviction may be irregular or erroneous, the party is not entitled to a writ of *habeas corpus*. *Platt v. Harrison, Sheriff*, 79.

2. Courts of equity exercise a general concurrent jurisdiction with courts of law, in the assignment of dower in all cases. *Phares v. Walters*, 106.

3. Where the jurisdiction is concurrent, courts of equity, equally with courts of law, are bound by the statute of limitations; and they act in obedience to the statute, rather than by way of analogy to the law. *Ib.*

4. If the court rendering a decree has no jurisdiction of the person of the defendant, he will not be bound, and this, whether the court is one of limited or general jurisdiction. And so, if the proceeding is against property, it cannot be condemned, and will not be bound, unless it is properly and legally brought before the court. *Gaylord v. Scarff*, 179.

5. After the rendition of a decree of foreclosure, under a tax deed, where the court is shown to have jurisdiction, the owner is concluded from showing, in a subsequent proceeding, the payment of the taxes prior to the sale. *Ib.*

6. Where an action is commenced by attachment against a non-resident, who is a mortgagee of real estate situated in the State, a levy of the attachment upon the lands so mortgaged to the defendant, will not give the district court of the county in which the lands lie, jurisdiction of the cause. *Courtney v. Carr*, 238.

7. An action against a non-resident defendant, to recover damages for the alleged fraud of the defendant in the sale of real estate situated in Boone county, commenced by attachment in the Boone county district court. The plaintiff had received a warrantee deed of the premises, and executed to the defendant a mortgage to secure the payment of a portion of the purchase money. Two writs of attachment were issued—one directed to the sheriff of Boone county, and the other to the sheriff of Polk. The writ directed to the sheriff of Boone county, was returned served, by attaching the land conveyed to the plaintiff, and on which the defendant held a mortgage. The writ directed to the sheriff of Polk, was served by attaching certain real estate of defendant, situate in that county. There was no service of any kind on the defendant. At the return term, the defendant appeared specially, and moved that the venue in said cause be changed to Polk county, which motion was overruled; *Held*, That the district court of Boone county had no jurisdiction of the cause; and that the court erred in overruling the motion. *Ib.*

8. The proof that a copy of the petition and notice was directed to the defendant, or that his residence is unknown, as required by section 1826 of the Code, is an element of jurisdiction; and if the record does not show that such proof was made, before the default was entered, the decree is void. *McGahan v. Carr*, 381.

9. To sustain a title under a sale for taxes, under a statute authority, in derogation of the common law, every requisite of the statute, having the semblance of benefit to the owner, must be strictly complied with, and the claimant under such a title, must prove that all the requisites of

the law have been complied with ; and unless the steps which the law requires to be taken, have been regularly pursued, the court has no jurisdiction under the statute, to divest a party of his property and vest it in the State, or another person. *Ib.*

10. When a subject matter is legally within the jurisdiction of courts of superior and of general jurisdiction, and the parties appear to have been brought, or to come, within it, a strong presumption of correctness and regularity attends their proceedings, and they are not under the necessity of stating upon their records many facts which a court inferior, and of limited jurisdiction must, or must show in some other way. *Campbell v. Ayres*, 339.

11. To give the district court jurisdiction on appeal from a justice of the peace, it must be shown, either that the appellee had the notice required by the statute, or that he made a voluntary appearance in the district court. *Quillian v. Windsor*, 396.

12. The district court possesses jurisdiction to set aside a certificate of pre-emption, granted by a county judge, under the act entitled "An act to prevent trespass or waste on swamp or other lands in the State of Iowa, and for other purposes," approved January 25, 1856, where the same has been obtained by fraud and misrepresentation. *Rogers v. Vass*, 405.

13. Where an indictment charged the defendant with unlawfully selling intoxicating liquors, by the glass or dram, on the first day of September, 1857 ; *Held*, That the district court had jurisdiction of the offense. *The State v. Axt*, 511.

14. Where an indictment charged the defendant with selling intoxicating liquors by the glass or dram, on the 14th of October, 1857 ; *Held*, That the district court had no jurisdiction of the offense charged, and no legal authority to render judgment against the defendant. *The State v. Rollet*, 585.

15. Although the time laid in an indictment is not material, and need not be proved as laid, yet where the defendant pleads guilty to the offense alleged, the fact that the State was not confined to the exact time laid in the indictment, and might have proved that the offense was committed at a prior date, cannot operate to uphold the jurisdiction of the district court, not otherwise shown by the record. *Ib.*

JURY.

1. There is no objection, in principle, to a jury seeing an object which is the subject of testimony. The practice lies in the discretion of the court. *Nutter v. Ricketts*, 92.

2. Where in an action of trover, for the conversion of two horses, the court permitted the jury, with H., who was the person supposed to have sold one of the horses to plaintiff, to go out and see the horse in the court yard ; and where it did not appear that H. and the jury spoke together, or that any improper circumstance appeared ; *Held*, That there was no impropriety in the proceeding. *Ib.*

3. It is the province of the court and its officers to empanel a jury ; and when a party is asked whether he has any objection to the jury, the question refers to the persons constituting it, and whether he has challenges to make ; and not to the right constitution of the jury in point of numbers. *Cowles v. Buckman & Son*, 161.

4. The law tenders the party a jury for the trial of his cause; and he is not to be charged, as with a fault, if the proper officer has not performed his duty by calling a full jury into the box. *Ib.*

5. Where a cause is tried before, and a verdict rendered by, a panel consisting only of eleven jurors, the defect is fatal, unless it has been waived. *Ib.*

6. It is only where a grand juror has formed or expressed an *unqualified* opinion, that the defendant is guilty of the offense for which he is held to answer, that he is disqualified from serving, if objected to on that ground, under section 2884 of the Code. *The State of Iowa v. Hinkle*, 880.

7. Where a party held to answer for a criminal offense, at the time of empanneling the grand jury, asked a juror whether he had not formed or expressed an opinion as to his guilt, to which the juror answered that he had, and thereupon the juror was challenged as incompetent; and where the court then asked the juror, whether he had formed or expressed an *unqualified* opinion of the guilt of the defendant, to which the juror answered that he had not—that his opinion was based upon rumor, upon which the challenge was overruled; *Held*, That the juror was not disqualified. *Ib.*

8. Where a party has been held to answer for a criminal offense, he cannot, after indictment found, object to the manner in which the grand jury had been selected and drawn. *Ib.*

9. It is not necessary that the verdict of a jury, whether rendered in open court, or sealed up and handed to the clerk, should be signed by the jurors. *Miller v. Mabon*, 456.

10. At the close of a trial, the parties agreed that the jury might seal up their verdict and hand it to the clerk, and thereupon the court adjourned until next morning. During the adjournment, the jury returned and delivered to the clerk their verdict, finding for the plaintiff, but it was not signed by either of the jurors. On the next morning, the verdict was read, and the defendant's counsel objected to the same, because it was not signed by the jurors. The jury was then re-called, in open court, into the box; and again, without objection by either party, retired to sign their verdict. After being out some time, they sent a written statement to the court, signed by all the jurors, to the effect that they could not agree upon a verdict. They were brought into court and asked, if the verdict sealed up by them and delivered to the clerk, was not their verdict at the time, to which several of the jurors replied, and all assented, saying that it was their unanimous verdict, and assented to by all the jurors, at the time it was sealed and delivered to the clerk. The jury was then discharged, and plaintiff moved for judgment on the verdict so sealed and handed to the clerk, which motion was overruled; *Held*, 1. That the plaintiff was entitled to judgment upon the verdict as returned, in the first instance, by the jury; 2. That the jury, after their separation, could not be allowed to say, that it was not their verdict; 3. That the fact that the plaintiff did not object to the jury going out to sign their verdict, did not conclude him from moving for judgment on the original verdict. *Ib.*

11. It is within the discretionary power of a court to refer a question of variance as to the date of a written instrument, which the court is unable to determine, to the jury. *Partridge v. Patterson*, 514.

JUSTICE OF THE PEACE.

1. The fact that an appeal was taken and allowed from a judgment rendered by a justice of the peace, more than ten days before the first term of the district court, after the appeal was taken, and that the jus-

tice failed to return the original papers, with a transcript of the entries on his docket, to the district court, until after said first term had elapsed, constitutes no ground for affirming the judgment of the justice, on motion of the appellee, at a subsequent term. *Holloway v. Baker*, 52.

2. The law does not affix, as a penalty on the appellant, for a failure of the justice to do his duty, that the judgment shall be affirmed.

3. In an action against a justice of the peace for wrongfully issuing an execution, a copy of the execution issued by him, with a copy of the constable's return indorsed thereon, certified by the defendant to be a true copy, may be offered in evidence by the plaintiff, without producing the original execution or accounting for its absence. *Dupont v. Downing*, 172.

4. In an action against a justice of the peace for wrongfully issuing an execution, when one of the issues to be determined is, whether the defendant issued the execution without lawful authority, the docket of the defendant as a justice of the peace, may be offered in evidence by the plaintiff, for the purpose of showing, negatively, that no judgment had been rendered against the plaintiff, by the defendant, as justice of the peace. *Ib.*

5. Where in an action against a justice of the peace for wrongfully issuing an execution, his docket is offered in evidence by the plaintiff, and that fails to show a judgment which would authorize the issuing of the execution against the plaintiff, the burden of proof is changed, and the defendant is required to produce the judgment, if any had been rendered. *Ib.*

6. Where in an action against a justice of the peace for wrongfully issuing an execution, the answer alleged that the execution was issued under the following state of facts: That the defendant was an acting justice of the peace for Johnson county; that the plaintiff was charged before him, on the information of one T. B., with an assault and battery, and being arrested and brought before the defendant for trial, such further proceedings were had, that a judgment was rendered against him, in the name of the State of Iowa, for five dollars and costs of suit; that in issuing execution on said judgment, the defendant by mistake inserted the name of said T. B. as plaintiff, instead of the State of Iowa; that the plaintiff at the time well knew the fact of said mistake, and fraudulently concealed the same, and procured his said property to be levied upon by the constable, and sold on said execution; that the proceeds of the sale have been applied in satisfaction of the judgment aforesaid; and that this, and none other, is the grievance complained of; to which answer was appended a transcript from the docket of defendant, as justice of the peace, showing all the proceedings had before him, on the trial of the information against plaintiff, for the assault and battery on T. B., from which transcript it appeared that the plaintiff pleaded not guilty, and demanded a jury; that the jury heard the evidence and returned a verdict of not guilty; that the defendant, as justice, set the verdict aside; that he then rendered judgment against plaintiff for a fine five dollars and costs; and this is the judgment on which the execution complained of, issued; and where the answer was demurred to, and the demurrer sustained by the court; *Held*, That the demurrer was properly sustained. *Ib.*

7. A justice of the peace possesses no power to set aside the verdict of a jury in a criminal case. *Ib.*

8. Nor has a justice of the peace any authority to try the prisoner himself, after the defendant has demanded a trial by jury, and render a judgment against him for a fine and costs. *Ib.*

9. It is not error for a justice of the peace to allow the jurat to a pe-

tion in replevin, to be amended so as to show that it was sworn to, and then to overrule a motion, made previously, to dismiss the suit, because the petition was not sworn to. *Hoover v. Rhoads*, 505.

JUSTIFICATION.

1. In trespass, where the defendant answers, denying the trespass, as alleged in the plaintiff's petition, and alleging matter in justification, the plea of justification does not confess the trespass, so as to dispense with proof of it on the part of the plaintiff. *Grash v. Sater et al.*, 801.

LEGISLATIVE POWER.

1. Where the legislature possesses the power to authorize an act to be done, it may, by a retrospective act, legalize and declare valid, any informality or irregularity in the exercise of the power thus conferred. *McMillen et al. v. The County Judge, &c.*, 391.

MARSHALING ASSETS.

1. In order to give a creditor the right to marshal assets or securities, it must appear that such assets or securities were liable to the general debts of the debtor. *Dickson et al. v. Chorn et al.*, 19.

MILL DAMS.

1. Under the act entitled "An act authorizing mill dams," approved January 24, 1855, certain facts are to be ascertained by the jury; and when ascertained and reported to the court, their finding or verdict must be deemed as conclusive upon the matters submitted to them, as the verdict of a jury in any other case. *Gammell v. Potter*, 548.

2. Until the verdict of a jury summoned under the act authorizing mill dams is set aside, their ascertainment of damages must be considered conclusive; and if the applicant elects to pay the damages, he is entitled to a license for the erection of the dam, if it is further ascertained by the jury, that no dwelling house, &c., will be overflowed, or injuriously affected by it, and if it further appears to the court that the same is reasonable, and for the public benefit. *Ib.*

3. In answer to a writ of *scire facias*, issued under the fifth section of the act authorizing mill dams, approved January 24, 1855, requiring the party to appear and show cause, &c., a defendant cannot assign as cause against the granting of the license to erect a dam, matters legitimately involved in the question of damages submitted to the jury, and pertinent only on application to set aside the finding of the jury, and award a new inquiry of damages. *Ib.*

4. In answer to a writ of *scire facias*, the defendant may allege and prove, as sufficient cause why a license for the erection of a mill dam should not be granted by the court, facts which tend to show that the same would be unreasonable, or that the dam, if built, would not be for the public benefit. *Ib.*

5. In proceedings under the act entitled "An act authorizing mill dams," approved January 24, 1855, matters that are intended to show improper interference by the plaintiff with the jury, and mistake or misconduct on the part of the jury themselves, in ascertaining the damages, do not amount to the sufficient cause contemplated by section five of the statute, why leave should not be granted to build the dam, but come more properly before the court, on an application to set aside the inquisition and award a new writ of *ad quod damnum*. *Ib.*

6. The statute authorizing mill dams, approved January 24, 1855, has made provision for compensating a party in money, for all loss, trouble or inconvenience resulting to him from the erection of a mill dam; and if his damages have not been properly assessed by the jury, he must either make the objection on an application to the court to set aside the verdict and award a new inquiry, or he must rely for redress on that provision of the statute, which reserves to him his right of action against the applicant, for any loss or damage to him from the dam, not actually foreseen by the jury, and estimated by them on the inquest. *Ib.*

MORTGAGE.

1. In a proceeding by an assignee to foreclose a mortgage, as against the mortgagor, and other parties claiming title under a tax deed, under the Code, which tax deed has been foreclosed against the mortgagor, and where the conclusive effect of the decree of foreclosure under the tax deed, depends upon the fact, whether or not the complainant was a prior incumbrancer upon the land, the respondents, who claim under the tax title, are entitled to demand that the complainant makes out his right to a decree against the mortgagor, by sufficient testimony. *Bleidorn v. Abel et al.*, 5.

2. Where a husband and wife mortgage a homestead to secure the payment of a partnership debt, of which firm the husband is a member, and subsequently to the execution of the mortgage, the said firm makes an assignment for the benefit of their creditors, the mortgagee is entitled to a *pro rata* share of the proceeds of the assets of the partnership in the hands of the assignee, and the homestead is only liable for the deficiency. *Dickson et al. v. Chorn et al.*, 19.

3. The mortgaging of the homestead by the husband and wife, to secure a partnership debt—the husband being a member of the co-partnership—and which co-partnership subsequently to the execution of the mortgage, makes an assignment for the benefit of creditors, does not give to the other creditors of the partnership, a right to make liable to their debts the homestead so mortgaged; nor does the *bona fide* release of the mortgaged premises by the mortgagee, and his receipt of a *pro rata* share of the proceeds of the partnership assets, entitle the other partnership creditors, to be subrogated to the rights of the mortgagee under the mortgage. *Ib.*

4. A mortgagee of real estate possesses no interest or title in the lands mortgaged, that can be attached. *Courtney v. Carr*, 238.

MOUNT PLEASANT.

1. The fourteenth section of the act entitled “An act to incorporate the city of Mount Pleasant,” approved July 15, 1856, which invests the city council with authority, among other things, to make ordinances “to license, tax and regulate auctioneers, transient merchants, hawkers, pedlars and pawn-brokers,” is not unconstitutional and void. *The City of Mount Pleasant v. Clutch*, 546.

MUTUALITY.

1. Where in an action to recover for materials furnished, and work and labor performed, in the erection of a house under a written contract, there was evidence tending to show, that after the house was finished, the plaintiff said to defendant, that if the mortar did not become hard, and make a cement within three months, he would not ask the defendant for the last payment; and where witnesses were introduced, some of whom testified that it did become hard, and others that it did not; and where the court

instructed the jury, "that if plaintiff said to defendant he would not call upon him for the last payment, if the cement did not prove to be better, this would not defeat the plaintiff's action, unless the proposition was acceded to by defendant:" *Held*, 1. That there was no objection to the instruction; 2. That the plaintiff was not bound by the promise, for the reason that there was no mutuality. *Ib.*

NEW TRIAL.

1. A judgment will not be reversed, unless it is made apparent to the appellate court, that a new trial is necessary in order to correct some injury resulting from the judgment appealed from. *Speers v. Fortner*, 558.

2. Where it does not appear with reasonable certainty, that the party complaining would be placed in a better condition, by giving him another trial, a new trial should not be granted. *Ib.*

NON-SUIT.

1. Where evidence is offered to a jury, the cause argued, and the jury are about to retire to consider of their verdict, a court possesses no power to non-suit a plaintiff; and where such a motion is made by a plaintiff, and sustained by the court, the legal effect of the proceeding is, that the plaintiff voluntarily takes the non-suit. *Chadwick v. Miller*, 84.

2. After a judgment of non-suit against a plaintiff in replevin, on his own motion, it is proper for the court to award a return of the property replevied to the defendant. *Ib.*

3. A plaintiff, who voluntarily submits to a non-suit, cannot assign for error, or have reviewed in the appellate court, the rulings and decisions of the court below. *Marsh v. Gruham*, 76.

4. Where there is any proper evidence before the jury, it is error to non-suit the plaintiff, on the motion of the defendant. *Crawford v. Burton*, 476.

5. Where in an action of replevin, the plaintiff claimed the goods by virtue of a purchase from one G. C., and on the trial offered in evidence a bill of sale from the said G. C., acknowledged and recorded, but which acknowledgment was defective, which bill of sale was objected to, and ruled from the jury by the court; and where the plaintiff then called as a witness, the said G. C., who testified that he sold the goods to plaintiff, receiving a considerable portion of the purchase money down, and plaintiff's note for the balance; that the plaintiff then took possession, and he (the witness), left the store; that plaintiff owned the store-house in which the goods were kept, both before and since the sale; that afterwards the plaintiff employed the witness to sell the goods for him, under which agreement witness went into the store, and was so selling them when they were taken; and that he then notified the defendant, that he, (witness), had no interest in them, but that they were owned by the said plaintiff; and where the court at this stage of proceeding, on motion of the defendant, directed that the plaintiff be non-suited; *Held*, 1. That the court erred in excluding the bill of sale from the jury; 2. That the court erred in rendering judgment of non-suit against the plaintiff. *Ib.*

NOTICE.

1. A party who receives title to real estate after the rendition of a judgment in an action of right, against his grantee, is not an innocent purchaser, without notice, and the plaintiff in the judgment is entitled to revive it, and have execution against such party. *Von Puhl et al. v. Rucker et al.*, 187.

2. In an action of right, the judgment is notice to all persons of the right of possession, as between the plaintiff and defendant. *Ib.*

3. When the statute fixes the terms of the district court, a defendant is bound to take notice of the time when such court sits. *Butcher v. Brand*, 235.

4. The purchaser of property actually in litigation, though for a valuable consideration, and though he may have had no express or implied notice, in point of fact, is affected in the same manner as if he had such notice. *Ferrier v. Buzick et al.*, 258.

5. The party relying upon a pending action, as notice to a purchaser *pendente lite*, must show that he has been constant and continued in its prosecution. *Ib.*

6. After an executor or administrator has appeared before the county court, in proceedings to prove up a claim against the estate, and consented to a continuance, and the appointment of an auditor to audit the claim of the plaintiff, he cannot, on appeal to the district court, move to dismiss the suit for want of notice, as required by law. *Voorhies & Co. v. Eubank, Ex.*, 274.

7. The purchaser of real estate, in the possession of a third person, is bound to take notice of such person's title to the possession, whether his title be legal or equitable. *Moore v. Pierson et al.* 279.

8. The possession of real estate, is sufficient to put a purchaser upon inquiry, and amounts to constructive notice of the title under which it is held. *Ib.*

9. Where it appears from the exemplification of a foreign judgment, that the defendant appeared, and submitted to the jurisdiction of the court, he cannot in a subsequent action on the judgment, object that he had no notice of the former suit. *Walker, Adm'r, v. Lathrop*, 516.

10. Under section 970 of the Code, the notice required to be given by a surety to the holder of a promissory note, to proceed by suit against the principal, must, in order to release the surety from liability, in case of the subsequent insolvency of the principal, be given in writing. *Stevens v. Campbe'l*, 588.

OCCUPYING CLAIMANT.

1. Where a party seeks to recover for the value of improvements made by him upon the land of another, he must bring himself within the statute, and pursue the statutory remedy. *Webster v. Stewart*, 401.

2. Where the rightful owner of real estate obtains possession of his property, without resorting to an action at law, he is not liable in an action at law for the value of improvements made by another. *Webster v. Stewart*, 401.

3. A party not in possession of real estate, cannot sustain an action, under chapter 80 of the Code, in relation to occupying claimants, against the holder of the legal title, to recover the value of improvements made by him upon such real estate. *Ib.*

4. Where a petition alleged, that the plaintiff, on the sixth of May, 1853, and prior thereto, was in possession of a certain tract of land, being part of the Half-Breed Tract, in Lee county, upon which, as occupying claimant, under color of title, and in good faith, he had made valuable improvements, specifying them; "that under and by virtue of the occupying claimant law of the State of Iowa, he was entitled to the continued possession and enjoyment of said premises, as against the owner in fee, until he

was paid the value of said improvements;" that the defendant, not regarding the rights of plaintiff, on or about the said 6th of May, purchased the fee simple title to said land, and unlawfully, wrongfully, and without the knowledge or consent of plaintiff, entered upon said land, and took possession of the same, and the improvements, and still retains the possession; and has hitherto refused, and still doth refuse to pay the plaintiff what the said improvements are reasonably worth; that the improvements are of the value of one thousand dollars; and that the value of the land without the improvements, is twelve hundred dollars; and where the petition then prayed for judgment for the value of said improvements, or if the defendant shall fail to pay the same, that the plaintiff be permitted to pay the value of the land; and where the petition was demurred to, and the demurrer sustained by the court; *Held*, That the demurrer was properly sustained. *Ib.*

5. Where a county judge makes a deed under the act entitled "An act regulating the disposal of lands purchased in trust for town sites," approved January 22, 1853, the deed should be made to the person who, as an occupant, is entitled to the same at the time the deed is made. *Hall v. Doran*, 433.

6. Where a complainant in equity claimed title to two lots in the city of Council Bluffs, and alleged that he, and those under whom he claims, had the right to said property, as occupying claimants, prior, and up to the time the land was entered by the county judge, under the act of Congress, entitled "An act for the benefit of citizens and occupants of the town of Council Bluffs, in Iowa," and approved April 6, 1854, and the laws of the State of Iowa, and at the time the said county judge conveyed the same to the respondents; that the possession of the respondents, if any they had, was by force and fraud, with a full knowledge of the rights of complainant; and that he was entitled to a deed from the county judge—all of which was denied by the answer; and where it appeared from the record, that a jury was "impanelled and sworn, to well and truly try the present issue joined, and a true verdict render according to law and evidence," which jury returned a verdict as follows: "We, the jury, find that the defendants are entitled to the possession and occupancy of the lots of land in question, on the 6th day of April, 1854," and thereupon the court rendered a judgment as follows: "It is therefore considered by the court that the plaintiff take nothing by his bill, and that the defendants have and recover of and from the said plaintiff their reasonable costs, and that execution issue therefor;" *Held*, That the verdict of the jury was on an immaterial issue, and settled nothing; and that the court erred in dismissing the bill. *Ib.*

7. Where a party claims title under the occupying claimant's act, he should show how that act creates a title originally, and facts and circumstances which show that the right could accrue to the party claiming the benefit of the act. *Gillis v. Black*, 439.

8. Under section 1233 of the Code, in relation to occupying claimants, a defendant in an action of right, can at any time, while in possession of the premises, file his petition to have the value of improvements made by him ascertained, and to obtain payment for the same, before surrendering the possession. *Dunn v. Starkweather*, 466.

ONUS PROBANDI.

1. The act of 1853, gives to the defendant the privilege of denying the execution of the instrument sued on, under oath, and when he does so deny it, the burden is changed to the plaintiff, who must prove the execution. *Lyon v. Bunn*, 48.

2. A plaintiff, by merely charging the defendant with having wrongfully issued an execution, cannot cast upon him the burden of producing the judgment to support it. The plaintiff must first make out a *prima facie* case against the defendant, before he can call upon the latter to disprove the charge against him. *Dupont v. Downing*, 172.

3. Where in an action against a justice of the peace for wrongfully issuing an execution, his docket is offered in evidence by the plaintiff, and that fails to show a judgment which would authorize the issuing of the execution against the plaintiff, the burden of proof is changed, and the defendant is required to produce the judgment, if any had been rendered. *Ib.*

ORIGINAL NOTICE.

1. It is not essential that an original notice should specify the time when the term of the district court will commence. *Butcher v. Brand*, 285.

2. A defendant upon whom an original notice is served, requiring him to appear and answer "on or before the second day of the next term" of the district court, has a right to assume the term next after the service, to be the "next" term mentioned in the notice. *Ib.*

PARENT AND CHILD.

1. A father may maintain an action for the seduction of his daughter, after she has attained her majority, if the seduction took place while she was a minor. *Stevenson v. Belknap*, 97.

2. The attaining the age of majority by the daughter, does not take away the father's right of action; nor is it either taken away or negatived by the provisions of the statute, which gives to the unmarried female the right to prosecute an action for her own seduction. *Ib.*

3. In an action by the father for the seduction of his minor daughter, brought after the female has arrived at her majority, the damages of the father are not restricted to the loss of service, and the actual expenses incurred, but he may recover exemplary damages. *Ib.*

4. Where actions for the seduction are brought both by the father and daughter, the jury may consider every fact which goes to the injury of the plaintiff, whether in mind, body, or estate, and may give damages commensurate with the injury sustained. In each case, the proof will be confined to the damages resulting to the plaintiff alone, and not to another, nor to the plaintiff, jointly with another. *Ib.*

5. In cases of seduction, where the female is a minor, the injury to the father is distinct from the injury to the daughter. They are different in character, and there is nothing incompatible, or inconsistent, in the idea of both resulting from the wrongful act of the same party. *Ib.*

6. Where in an action by a father for the seduction of his minor daughter, the defendant asked the court to instruct the jury as follows: "That if the daughter was a minor at the time of the seduction, and the suit was not brought by the father during her minority, that then the right of action was in the daughter alone, and the action cannot be maintained by the father," which instruction was refused by the court; *Held*, That the instruction was properly refused. *Ib.*

7. As between the parties, the conveyance of real estate by a parent to a child, will be upheld, as being founded upon a meritorious consideration. *Moore v. Pierson et al.*, 279.

8. Where an agreement between parent and child for the conveyance of

real estate is executory, exists in parol, and is unassisted by the fact of possession and permanent improvements, taken and made upon the faith of such promise, courts of equity will not aid the donee by decreeing a specific performance of the agreement. *Ib.*

9. Where the promise of the parent to convey real estate to the child, is clearly, definitely, and conclusively established, and where the child, upon the faith of it, has entered into possession, and made valuable and permanent improvements upon the land, the parent will be decreed to specifically perform the agreement. *Ib.*

10. In such cases, it will not avail the donee, if his improvements are temporary, of but little value, or simply for his convenience as an occupying tenant. They must be of a permanent character—such as clearly show that he regards and designs to treat the land as his own, and relies upon the promise of the father. *Ib.*

11. J. P. had a number of sons, and had helped all of them, either by giving them land, or means with which to enter the same, or start in business. One of the sons, L., (a twin brother of A.), died in 1848 or 1844, being unmarried, and leaving no issue. L. at the time of his death, was in the possession of eighty acres of land, and held the title, either legal or equitable, as also another tract of land. Whether the legal title was in the father, and the equity in the son, or whether the father's legal title accrued upon the death of L., and as his heir at law, did not satisfactorily appear. The improvements upon the eighty acres, at the time of the death of L., were put there by him, and there was nothing to show that the father had ever expended a dollar upon the land. On his death-bed, L. desired that his father should see that his interest in this eighty should be given to A., and this desire the father promised should be carried out. His other land, L. desired should be given to his brother J. After his brother's death, A. took possession and made large improvements upon the eighty acre tract, consisting of fencing, and a barn, at an expense of some \$1,000 or \$1,200. During all this time, the father resided near the premises, and had full knowledge of the possession and improvements. On two or three occasions he expressed his intention to carry out the will of L., in relation to the eighty, and he uniformly spoke of it as A.'s. A. continued in possession, and enjoyed the rents and profits, to the time of his leaving for California, and after that, it was occupied by his tenants—this possession covering a period of some twelve or fourteen years. In 1854, by correspondence, A. sold the eighty acre tract, with other lands, to M. While M. was negotiating with A., knowing that the legal title was in the father, he called upon him, and obtained his promise to make the deed. Subsequent to this, the father spoke to other persons of M.'s trade with A., and stated that he was glad that M. was to get the place, and that he had agreed to help him make the payments. On bill filed by M. against the father, to compel a specific performance of the promise to make a deed; *Held*, That J. P. should be required to make the deed to M.

PATENT.

1. The recording act of this State has no reference to patents for land issued by the United States; and a copy of such a patent contained in the record books of a county, is not admissible in evidence under section 1228 of the Code; and were it so admissible, there should be some evidence accounting for the absence of the original patent, and the record books should be proved. *Curtis v. Hunting*, 586.

PAYMENT.

1. In January, 1852, S. & S., attorneys at law, received for collection

from G. E. G., two notes against B.; B. being unable to pay at once, assigned to W. H. S., one of the attorneys, in trust, and as collateral security on this debt, a bond which B., with one W., held against L. and J. G., for the conveyance of certain lands, amounting to one hundred acres, in which land B. held an interest of one undivided moiety. S. gave a receipt to B., identifying the bond, and stating that he was to hold the same in trust, until said B. secured by mortgage or otherwise, two notes given by him to G. E. G., dated this day, for three hundred and fifty-five dollars and sixty-one cents, each, payable in four and six months"—which receipt bears date January 2, 1852. Afterwards S. & S. received from C. & S. for collection, certain claims which they held against B., which were settled by the latter giving two notes for four hundred and twelve dollars and seventy-three cents each, and to secure them, B. made another assignment of his interest in the same bond, causing the assignment to cover the demands of both G. E. G. and C. & S. Upon this arrangement, on the 24th of January, 1852, S. & S. gave B. a new receipt, reciting the assignment of the bond to S., and the claims held by them in favor of both creditors, to-wit: two notes in favor of G. E. G., and two in favor of C. & S., and stipulating that the condition of the assignment of the bond by B. to S., was "for the purpose of securing the payment of said notes, and no other, and if B. should at any time be able to get the title to said property," the bond was to be delivered up to him, he securing the said notes by mortgage on the property. On the 26th of May, 1852, S. assigned his right and title to the bond to S., his partner, who obtained the legal title to the land. On bill filed by C. & S. against S.—the party holding the legal title to the bond—and G. E. G., the other creditor—praying that the trustee might be decreed to sell the land; and claiming that they were entitled to priority of payment, or, at least to share equally in the fund with G. E. G.: *Held*, 1. That S., to whom the bond was assigned, was properly admitted to testify to the circumstances under which the bond was assigned, and the intention of the attorneys, S. & S., in relation to the rights of the creditors; 2. That such testimony did not contradict the receipt given by S. & S. to B.; 3. That G. E. G. was entitled to priority of payment out of the trust fund. *Cox & Shelley v. Garber et al.*, 211.

2. Where in an action on a promissory note, commenced on the 27th of March, 1857, the defendants answered, alleging, that in consideration of the payment of the sum of \$1,186.41 on said note, without discount or allowance therefor, two months before the note became due, and when the note was not drawing interest, the plaintiffs agreed with the defendants, that the time of payment on the balance due on the note should be extended to the first day of August, 1857, and the same should not be due until then, and that the action was commenced before the note became due under the agreement—to which answer there was a demurrer, which was sustained by the court; *Held*, 1. That the court erred in sustaining the demurrer; 2. That the matter pleaded was good as a plea in abatement; 3. That the agreement set up in the answer, to be valid, need not be in writing. *Cox & Shelley v. Carrell & Co.*, 350.

PENALTY.

1. In an action on an agreement in the nature of a penal bond, the plaintiff cannot recover the penalty named in the agreement, nor any sum more than nominal, until some damage is averred and shown. *Linder v. Lake*, 164.

PETITION.

2. Where a petition commenced as follows: "Your petitioner claims of," &c., "one hundred and eighty dollars, which he alleges to be due him

from the defendant, and for cause of such claim," and after describing two notes in one count, concluded as follows: "Which said promissory notes are still the property of your petitioner, and that the amount above claimed, is still due thereon. He therefore asks judgment for that amount, with interest and costs;" which petition was filed January 5, 1857, and service had at same time; and where the court rendered judgment against defendant for the sum of \$187,90, at the September term, 1857, with interest thereon at ten per centum per annum; *Held*, 1. That the plaintiff could take judgment for the sum claimed, with interest from the commencement of the action, under the clause in the petition praying judgment for the sum claimed, with interest; 2. That the court erred in rendering judgment for ten per cent. interest per annum. *Butcher v. Brand*, 285.

2. Under a prayer in a petition, asking judgment for the amount claimed, with interest, the plaintiff may take judgment for the sum claimed, with interest on *that* sum from the commencement of the suit. If he would take judgment for more, he must increase his *ad damnum*. *Ib.*

PLEADING.

1. An answer to a petition on a promissory note, which "denies that the defendant is indebted to the plaintiff in the sum named in the petition, or in any less sum, and that the defendant made and executed the note described in said petition, as therein alleged," is sufficient to put in issue the execution of the note sued on, in the same manner as the plea of *non est factum* would have done, in an action of debt under the old system of pleading; and such allegations in an answer, are not irrelevant and redundant. *Lyon v. Bunn*, 48.

2. In order to make an issue as to the execution of an instrument on which suit is brought, the first section of the act entitled "Act relating to evidence," approved January 24, 1858, does not require that the answer of the defendant, denying its execution, should be sworn to. *Ib.*

3. And such an answer sufficiently denies specifically, every material affirmative allegation of the petition, is directly responsive to the petition, and presents an issue of fact for trial. *Ib.*

4. Where a party pleads a former adjudication of the matter in controversy, he should bring into court, and make proof of, an exemplification or transcript of the former cause, and thus make it a part of his case. *Campbell v. Ayres*, 839.

5. If he does not do so, his adversary may take exception to the pleadings, but he is not obliged to do so. *Ib.*

6. A plea to the jurisdiction of the court, or of another action pending, is as proper and legitimate now, as before the Code. *Rawson v. Guiberson*, 507.

7. Where a former suit on the same cause of action is dismissed, after the defendant pleads such former suit in abatement, the plea should be sustained. *Ib.*

8. Where it does not appear from the pleadings or evidence, in a cause in which the defendant pleads in abatement a former action pending, whether the former suit was dismissed *before* or *after* the filing of the plea, and where it appears from the record that the court below sustained the plea in abatement, it will be presumed that the former action was not dismissed until after the plea was pleaded. *Ib.*

9. Where an action was brought on an agreement in writing, as follows:
"State of Iowa, Clayton county, 1855. We, the undersigned, agreed to pay,

the sum of money annexed to our names, as subscribed by us in our own handwrite, whenever the county judge of Clayton county, shall certify on the back of this paper, that a good and substantial bridge has been built across Turkey River, at Millville, in the county of Clayton, designating also, the person to whom payment shall be made;" to which instrument, it is averred by the petition, the defendant subscribed fifty dollars, and that on the 7th of May, 1857, the county judge of Clayton county, certified on the back of said paper, that a good and substantial bridge had been built across Turkey River, at Millville, in the county of Clayton, and that the several sums of money subscribed, were justly due to the plaintiff; and where the petition was demurred to, and the demurrer sustained by the court; *Held*, 1. That it was not necessary for the plaintiff to aver the consideration upon which the agreement was executed; 2. That it was not necessary for the plaintiff to aver that he had built the bridge; 3. That the fulfilment of the conditions upon which the money was payable, was sufficiently averred. *Towsley v. Olds*, 526.

POSSESSION.

1. The purchaser of real estate, in the possession of a third person, is bound to take notice of such person's title to the possession, whether his title be legal or equitable. *Moore v. Pierson et al.* 279.

2. The possession of real estate, is sufficient to put a purchaser upon inquiry, and amounts to constructive notice of the title under which it is held. *Ib.*

3. Where the rightful owner of real estate obtains possession of his property, without resorting to an action at law, he is not liable in an action at law for the value of improvements made by another. *Webster v. Stewart*, 401.

4. A party not in possession of real estate, cannot sustain an action, under chapter 80 of the Code, in relation to occupying claimants, against the holder of the legal title, to recover the value of improvements made by him upon such real estate. *Ib.*

5. Where a petition alleged, that the plaintiff, on the sixth of May, 1853, and prior thereto, was in possession of a certain tract of land, being part of the Half-Breed Tract, in Lee county, upon which, as occupying claimant, under color of title, and in good faith, he had made valuable improvements, specifying them; "that under and by virtue of the occupying claimant law of the State of Iowa, he was entitled to the continued possession and enjoyment of said premises, as against the owner in fee, until he was paid the value of said improvements;" that the defendant, not regarding the rights of plaintiff, on or about the said 6th of May, purchased the fee simple title to said land, and unlawfully, wrongfully, and without the knowledge or consent of plaintiff, entered upon said land, and took possession of the same, and the improvements, and still retains the possession; and has hitherto refused, and still doth refuse to pay the plaintiff what the said improvements are reasonably worth; that the improvements are of the value of one thousand dollars; and that the value of the land without the improvements, is twelve hundred dollars; and where the petition then prayed for judgment for the value of said improvements, or if the defendant shall fail to pay the same, that the plaintiff be permitted to pay the value of the land; and where the petition was demurred to, and the demurrer sustained by the court; *Held*, That the demurrer was properly sustained. *Ib.*

6. Where a party claims title to real estate, by virtue of occupancy and actual adverse possession, he should aver what length of time and possession he relies upon. *Gillis v. Black*, 439.

PRACTICE—IN CIVIL CASES.

1. Where evidence is offered to a jury, the cause argued, and the jury are about to retire to consider of their verdict, a court possesses no power to non-suit a plaintiff; and where such a motion is made by a plaintiff, and sustained by the court, the legal effect of the proceeding is, that the plaintiff voluntarily takes the non-suit. *Chadwick v. Miller*, 84.

1. The act of 1853, gives to the defendant the privilege of denying the execution of the instrument sued on, under oath, and when he does so deny it, the burden is changed to the plaintiff, who must prove the execution. *Lyon v. Bunn*, 48.

3. It is not necessarily a sufficient ground for quashing a writ of attachment, that it does not follow the action, or, in other words, that the suit is against two, and the writ against one of the defendants only. *Patterson v. Stiles*, 54.

4. Nor is it a sufficient reason for quashing an attachment issued in a suit against two defendants, that the attachment bond is made to one, and not to both defendants. *Ib.*

5. The facts stated in the answer of a garnishee, when not controverted, are to be taken as true. *Meeker v. Sanders*, 61.

6. Where it appears from the transcript of a record in the supreme court, that the cause was submitted to the court below, upon the record and evidence, to be decided in vacation, it will be presumed that this was not done, except by consent. *The State v. Strong*, 72.

7. The appellate court will not presume that any improper testimony was admitted by the court below. *Ib.*

8. A bill of exceptions, showing the improper testimony admitted, is the proper mode of bringing the matter to the attention of the supreme court. *Ib.*

9. Where it is sought to reverse a judgment, on the ground that the verdict is excessive, and contrary to the evidence, the whole of the testimony must be brought before the appellate court, or the objections arising from the finding of the jury cannot be considered. *Nutter v. Rickets*, 92.

10. The want of consideration, or the failure, in whole or in part, of the consideration of any written contract, must be averred and shown by way of defence. *Linder v. Lake*, 164.

11. Where an action is brought upon a written contract, the objection that no consideration is shown upon the face of the instrument, or that none is averred by the plaintiff in his petition, cannot be raised by a demurrer. *Ib.*

12. In a proceeding by *scire facias*, to revive a judgment in an action of right, and show cause why execution should not issue, a party to whom the property has been conveyed by the judgment defendant, subsequent to the judgment, and who is in possession, is a proper party defendant with the defendant in the judgment. *Von Puhl et al. v. Rucker et al.*, 187.

13. A motion to strike from a pleading redundant or irrelevant matter, is a matter within the discretion of the court; and the overruling such a motion, is not a ground of error. *Abbott v. Striblen*, 191.

14. The district court is not bound to give or refuse instructions in the form and terms presented by a party, but may modify them so as to meet the views of the court upon the law; or add to such instructions such

matter explanatory of them, as the court may deem proper to a right understanding by the jury. *Ib.*

15. Under a prayer in a petition, asking judgment for the amount claimed, with interest, the plaintiff may take judgment for the sum claimed, with interest on *that* sum from the commencement of the suit. If he would take judgment for more, he must increase his *ad damnum*. *Butcher v. Brand*, 285.

16. Where on an issue of a former adjudication, a certified copy of a judgment is offered in evidence, it will be insufficient, without the petition and pleadings upon which it was rendered. *Campbell v. Ayres*, 339.

17. When the decision on the facts rests in the same mind which pronounces the judgment of the law upon the facts, the final judgment of the law is all that need be expressed in the record of the court, unless the court is requested, under 1798 of the Code, to state the facts found and the conclusions thereon, in writing. *Gallinger v. Vale, Adm'r.* 387.

18. A judgment entry as follows: "On this day came plaintiff, by H. H. Runnels, his attorney, and the defendant, by F. Semple, his attorney, and submitted this cause to the court; and the court being fully satisfied in the premises, it is ordered and adjudged that the judgment of the court below be reversed, and the plaintiff pay the costs herein. It is therefore ordered and adjudged that the defendant, John Vale, Executor, &c., have and recover of the plaintiff and his surety, &c., the costs of this suit, taxed at \$———," is sufficiently regular and certain upon its face. *Ib.*

19. Without a denial under oath, the plaintiff need not prove the execution nor assignment of a promissory note, in the first instance. *Seschrist v. Griffeth et al.*, 390.

20. Where in an action on a promissory note, in the name of the assignee, the defendants deny the execution and assignment of the note, but the answer is not sworn to, the defendants may introduce evidence to sustain their denial. The effect of such an answer is to change the burden of proof from the plaintiff to defendant. *Ib.*

21. A bill of exceptions which embraces all the rulings and decisions of the court on the trial, complained of, and shows that the exceptions were taken in fact at the proper time, is unobjectionable. It is not necessary that each ruling complained of, should be the subject of a separate bill of exceptions. *Anderson v. Ames & Co.*, 486.

22. An allegation in a petition, not denied by the answer, is to be taken as true, and requires no proof. *Walker, Adm'r, v. Lathrop*, 516.

23. Where a party in a suit issues a subpoena for his adversary, to appear and testify in the cause, which is returned not served, he cannot be admitted as a witness for himself, under section 2421 and 2422 of the Code. In order to make himself a competent witness, he must show that the other party has been served with a subpoena, and that he has failed to appear. *Stevens v. Campbell*, 538.

24. Where in an action on a promissory note, the jury returned a verdict as follows: "We, the jury, find for the plaintiff, for the note and interest;" and where the court referred the cause to the clerk in assess the damages, who reported the same to the court, and thereupon judgment was rendered against defendant by the court for the amount so reported by the clerk, with costs; *Held*, 1. That the intention of the jury was sufficiently indicated by the language of the verdict; 2. That the action of the court in referring the assessment of damages to the clerk, was nothing more than reducing the verdict to proper form. *Ib.*

PRACTICE—IN CHANCERY CASES.

1. Where in a chancery proceeding, the bill states a case within the statute of limitations, the objection may be taken in a defence by demurrer. *Phares v. Walters*, 106.

2. If a complainant in chancery, be within any of the exceptions of the statute of limitations, it is his duty to state it in his bill. *Ib*

3. Where a sworn answer in chancery sets up matter not responsive to the bill, the new matter is not to be taken as true. *Schaffner et al. v. Grutzmacher et al.*, 137.

4. In equity, where the allegations of the petition are not denied, they are to be taken as true. *Ferrier v. Buzick et al.*, 258.

5. Where a defect in a bill in equity is one of form merely, or where the case stated in the bill is such that the court can properly proceed to a decree, the insufficiency of the bill cannot for the first time, be raised on appeal. *Aliter*, Where the bill shows a want of equity. *Moore v. Pierson et al.*, 279.

6. In chancery, correct practice requires that specific and distinct issues of fact should be submitted to the jury, that the conscience of the chancellor may be advised by the special verdict responsive to the issues thus made. *Hall v. Doran*, 438.

PRACTICE—IN CRIMINAL CASES.

1. A defendant's right may be seriously compromised by his being compelled to go to trial upon an indictment charging more than one offense; and the fact that the defendant has pleaded not guilty to the whole indictment, is not sufficient to deprive him of the right to compel the prosecutor to elect on which charge he will proceed to trial. *The State v. Abrahams*, 117.

2. In such a case, the court should permit the defendant to withdraw the plea, for the purpose of filing a motion to direct the prosecutor to elect on which of the offenses charged in the indictment, he will proceed to trial. *Ib*.

PRE-EMPTION.

1. In a proceeding to set aside a certificate of pre-emption of swamp lands, granted by a county judge, on the ground that the same was obtained by fraud and misrepresentation, it is not necessary to make the county judge a party. *Rogers v. Vass*, 405.

2. Where a party who has obtained a certificate of pre-emption of swamp lands, has not complied with the statute, and had no right of pre-emption, it is competent for any one to enter upon the land, make his improvements and claim the pre-emption, although such entry and improvements were made after the granting of the certificate. *Ib*.

3. Where a party claiming a right of pre-emption to certain lands, brought his bill in equity to set aside a certificate of pre-emption of the land, granted by a county judge, alleging that, on the first of June, 1857, and immediately subsequent thereto, he *bona fide*, commenced and built a dwelling on the said land, with the intent to reside thereon, and cultivate the same; that within sixty days thereafter, he filed his claim before the county judge of Fremont county, and offered proof of his improvement, but the county judge refused to grant him a certificate of pre-emption, or to allow his claim, upon the alleged ground that the respondent had, before that time, received a certificate of pre-emption to three-quarters of the

same quarter; that the said respondent had not made any improvements or settlement upon the said land; and that his certificate was obtained by fraud and misrepresentation, and was void; to which bill there was a demurrer, which was sustained by the court; *Held*, That the court erred in sustaining the demurrer. *Ib.*

PRESUMPTION.

1. Where the transcript of a record does not disclose the evidence in the court below, the appellate court is bound to presume that the evidence was sufficient to authorize the judgment. *Vredenburg v. Snyder*, 39.

2. Where it appears from the transcript of a record in the supreme court, that the cause was submitted to the court below, upon the record and evidence, to be decided in vacation, it will be presumed that this was not done, except by consent. *The State v. Strong*, 72.

3. The appellate court will not presume that any improper testimony was admitted by the court below. *Ib.*

4. Where nothing is shown to the contrary, the appellate court will presume that an instruction given by the court below was pertinent to the case. *McGinnis v. Hart et al.*, 204.

5. On appeal to the district court, where there has been a trial of the cause before the justice of the peace, a general denial of indebtedness will be presumed to have been made upon the trial, if nothing appears to the contrary upon the record. *Hall v. Denise*, 534.

6. The supreme court will not presume a state of facts in order to find error, but every presumption is in favor of the ruling in the court below. *Spears v. Fortner*, 553.

PRINCIPAL AND SURETY.

1. The owner of a joint judgment against a principal and surety, the principal debtor having died since the rendition of the judgment, is not required to present his claim against the estate of the deceased, and have the same allowed, in order to preserve his remedy against the surety. *Ib.*

2. Where a party seeks to recover for money paid as surety for another, his cause of action accrues at the time when the money is paid; and from that time, the statute of limitation commences to run. *Walker, Adm'r, v. Lathrop*, 516.

3. Where in action to recover money paid as surety for the defendant, under a judgment rendered in April, 1849, the answer alleged: 1. That more than ten years had elapsed since the recovery of the said judgment; 2. That the defendant did not *undertake and promise* at any time within five years, or within ten years, or at any time since the taking effect of the Code; and the court found for the plaintiff, and rendered judgment in his favor; *Held*, That the judgment was correct. *Ib.*

4. Under section 970 of the Code, the notice required to be given by a surety to the holder of a promissory note, to proceed by suit against the principal, must, in order to release the surety from liability, in case of the subsequent insolvency of the principal, be given in writing. *Stevens v. Campbell*, 538.

PROMISSORY NOTE.

1. Where a promissory note is lost after suit brought, the attorney for the plaintiff is a competent witness to prove its loss, and that a copy of the

note annexed to the petition is a true copy ; and after such proof, the copy of the note is admissible in evidence. *Abbott v. Striblen*, 191.

2. Where in an action against the indorser of a promissory note, the defendant asked the court to instruct the jury as follows: "1. That before the indorser of a promissory note is liable for the payment thereof, he must have due notice of its dishonor and protest; 2. That before an indorser can be held liable for the payment of a promissory note, without such note being first duly protested or dishonored, the jury must find that the note was given for the accommodation of the indorsee only, and that he has the sole interest in the payment, and must ultimately pay the same; which instruction the court gave, with the following addition: "This is true; but if the jury find that the indorser waived protest and notice, or, after the day of payment, expressly promised to pay the note, or indorsed and passed it for a valuable consideration, he is liable in this suit;" and where the defendant also asked the court to instruct the jury as follows: "That before the indorser of a note, without notice of its dishonor, can be held liable on a subsequent promise to pay, it must be shown that he made the promise with a full knowledge of the fact that the note was not duly dishonored"—which instruction was given by the court, with an addition, as follows: "But the jury must take into consideration all the evidence and facts, in order to determine whether the defendant had notice of the note being protested; and if the jury find that defendant, before its maturity, requested that the note might not be put in bank, to avoid a protest, he cannot take advantage of the fact, that it was not duly protested, and that he was not notified;" and where the defendant further asked the court to instruct the jury: "That the law will not infer that an indorser who promises to pay the note after its maturity, had knowledge that it was not duly protested;" which instruction was given with the addition: "But if the jury find that the maker was insolvent, and that the indorser knew and acknowledged that fact, and stated to the plaintiff, that in consequence thereof, it was not necessary to put the note in bank, and make additional costs by protest, &c., he can take no advantage of the want of demand and protest;" and where it appeared that the court, and the counsel of the defendant, treated the instructions as implying that the term "protest and notice," included a *demand* of payment; *Held*, That there was no error in the instructions. *Ib.*

3. In an action by the indorser against the indorsee of a promissory note not negotiable, it is not necessary for the plaintiff to show diligence against the maker; and the want of such diligence, constitutes no defence to the action. *Hall v. Monohan*, 216.

4. In such cases, the indorser stands in the relation of a principal, and not surety, to his indorsee, and has no right to insist on a previous demand of the maker, and notice of non-payment. *Ib.*

5. Under section 108 of the Code, a promissory note issued by a county, need not be executed by a county judge in his official capacity, and acknowledged by him, nor have the county seal affixed. *Ring v. The County of Johnson*, 265.

6. Without a denial under oath, the plaintiff need not prove the execution nor assignment of a promissory note, in the first instance. *Seachrist v. Griffith et al.*, 390.

7. Where in an action on a promissory note, in the name of the assignee, the defendants deny the execution and assignment of the note, but the answer is not sworn to, the defendants may introduce evidence to sustain their denial. The effect of such an answer is to change the burden of proof from the plaintiff to defendant. *Ib.*

8. An answer in an action on a promissory note, which denies the assignment of the note, but is not sworn to, is not demurrable for that reason. *Ib.*

9. A promissory note, with a proviso as follows: "Provided that John C. Fremont has not a majority of six thousand votes at the ensuing election in the State of Iowa," is void, under section 2724 of the Code. *Sipe v. Finarty*, 394.

10. In order to sustain an action on such a note, the plaintiff cannot show that it was given for a full and valuable consideration. *Ib.*

11. Where a plaintiff is in possession of the note on which suit is brought, and is the payee therein, he will be presumed rightly in possession of it; and the assignment on the back of the note, will be taken to have been erased by proper authority. *Goddard v. Cunningham*, 400.

12. In an action against the guarantor of a promissory note, where the guarantee is written on the back of the note, the plaintiff is not required to prove the signature of the guarantor, unless the same is denied under oath. *Partridge v. Patterson*, 514.

PROSTITUTION AND LEWDNESS.

1. The law makes no distinction between the act of letting a house for the express purpose of prostitution, and the letting of it for a proper purpose, and afterwards knowingly permitting it to be used for the purpose of prostitution; and if a party knowingly permit the lessee to use the premises for such illegal object, he is liable under section 2712 of the Code, although, at the time he leased them, he did not know they were to be so used, and did not lease them for that purpose. *The State v. Abrahams*, 117.

2. Where the defendant is charged with knowingly permitting his house to be used for the purpose of prostitution and lewdness, it must be shown that he did some act, or made some declaration, affirmatively assenting to the premises being so used, after he had knowledge that they were being used for such illegal purpose. *Ib.*

3. Mere inactivity on the part of the defendant, or a failure to take some steps to prevent the illegal use, is not permitting it, in the sense contemplated by the statute. An affirmative assent is necessary. *Ib.*

4. Where on the trial of an indictment, charging the defendant with letting a house for the purpose of prostitution and lewdness, and with knowingly permitting it to be so used, the court instructed the jury as follows: "That mere inactivity on the part of the defendant, or failure to take some steps to prevent the illegal use, is not permitting it, in the sense contemplated in the law; that an affirmative assent was necessary; that to make defendant liable, there must be, on his part, a consent to such use, either expressly given, or given by his silent acquiescence; that a mere failure to interfere, or to prosecute, so as to prevent the illegal use, cannot be construed to amount to a permission, or into a silent affirmative acquiescence in such use; and that if the jury find from the evidence, that the defendant did, by any act or declaration, affirmatively assent to the premises being so used, after he had knowledge of the purpose for which they were used, he is guilty as charged; and where the jury after being out some hours, came into court and stated, "that there was some trouble, as to whether the defendant should have assented to the fact charged, to the person occupying the house, or whether it could be done to any other persons," whereupon the jury were instructed as follows: "That it is not necessary that defendant should have told the lessee, that he consented to the same being used for the illegal purpose; that consenting to

a thing is the result of our own mind; that all that was necessary was to find that defendant actually consented; that the assent was the result of his own mind, and need not be coupled with any other person; and that in order to ascertain the assent, the jury must find that the defendant did some affirmative act, or made some declaration, in connection therewith, or in relation thereto, from which the jury may find that the defendant did so assent; *Held*, That while one or two sentences of the latter instruction are somewhat ambiguous, yet that the concluding words distinctly hold, that the jury must find that the defendant did some affirmative act, or made some declaration, from which to conclude his assent; and that the instruction could not tend to mislead the jury. *Ib.*

RECEIVER.

1. Where in an action of right, it appeared that the defendant held title to the real estate by purchase from the school fund commissioner; that on the 18th of January, 1856, he executed an absolute deed of the premises to S. and B., who, on the same day, executed to him a deed of defeasance, conditioned to reconvey to him, upon his paying a certain sum of money in one year from date, which makes time of the essence of the contract, and provides that in case of a failure to pay promptly, a promissory note signed by the defendant and C., (one of the plaintiffs), the obligors reserve to themselves the right to enter upon, and take possession of, the premises, and declare the contract forfeited; that the time of payment was extended by S. and B. to January 18, 1858; that on the 11th of February, 1858, S. and B. executed to the plaintiffs a bond for the conveyance of the land, upon the payment at certain times, of a given sum of money, and giving them possession thereof; and that one of the plaintiffs took the bond from S. and B., with notice of the bond held by the defendant; and where, while the action of right was pending, the plaintiffs filed their petition for the appointment of a receiver, to take charge of the property, on the ground of the insolvency of the defendant, and thereupon the court appointed a receiver; *Held*, That the court erred in appointing a receiver. *Cofer et al. v. Echerson*, 502.

REPEAL.

1. The revenue act of 1847, was repealed by the Code, without any saving of the remedies existing at the time of the repeal, for the collection of taxes levied and delinquent; and there was no authority under the Code, for selling in 1852, lands delinquent for the taxes of 1848. *Bleider v. Abel et al.*, 5.

REPLEVIN.

1. After a judgment of non-suit against a plaintiff in replevin, on his own motion, it is proper for the court to award a return of the property replevied to the defendant. *Chadwick v. Miller*, 34.

2. In replevin, the plaintiff takes the property from the possession of another, under a claim of right to either the possession, or the property itself, or to both; and it follows, as of course, that if he fails to establish the right set up, the property should be returned to him from whom it was taken. *Ib.*

3. In replevin, the plaintiff must recover upon the strength of his own right to the present possession of the property. Whatever the right or title under which the defendant may hold the property, if the plaintiff is not entitled to the present possession, he must fail in his action. *Marienthal, Lehman & Co. v. Shafer et al.*, 228.

4. A party who has sold intoxicating liquors in this State, with intent to enable another to violate the act for the suppression of intemperance, approved January 22, 1855, cannot sustain an action of replevin against a sheriff, and attaching creditors of the person to whom the liquors were sold, for the recovery of the possession of such liquors, on the ground that the sale was void, and the right to the possession of the liquors still remained in the vendor. *Ib.*

5. Where in an action of replevin, to recover the possession of intoxicating liquors, against the sheriff and the attaching creditors of N., which liquors were sold by the plaintiff to N., with intent to enable him to violate the act for the suppression of intemperance, the court instructed the jury as follows: "That if the jury find that the contract for the sale of the liquors was made in the State of Iowa, to be sold in violation of the law, no right of property ever passed out of plaintiff to N. by reason of such sale; but it remained in plaintiff, and was not subject to the attaching creditors of N.;" and "that if they believed that defendants held through N., as attaching creditors of his, they must find for plaintiff, if they also found that the attachment was made while the liquor law was in force;" *Held*, That the instructions were erroneous. *Ib.*

6. An affidavit to a petition in replevin, signed "G. W. & R. H.," and sworn to by both the plaintiffs, is not objectionable. *Hoover v. Rhoads*, 505.

7. Where in an action of replevin before a justice of the peace, damages are claimed in the original notice served on the defendant, the plaintiff is entitled to recover all the damages he had sustained by the illegal detention of the property. *Ib.*

REPLEVIN BOND.

1. In an action on a replevin bond, for the non-return of property, as awarded, the petition and other papers in the replevin suit, are competent evidence to sustain the suit on the part of the plaintiff. *McGinnis v. Hart et al.*, 204.

2. Where in action on a replevin bond, the petition claimed as damages the sum of seven hundred dollars—the penalty named in the bond—and the petition, in stating the cause of action, alleged that the defendants did not return the property, but converted it to their own use, by means of which the plaintiff was damaged in the sum of two hundred and fifty dollars; and where judgment was rendered for the plaintiff for the sum of four hundred and forty-five dollars; *Held*, That the court did not render judgment for a greater amount of damages than was claimed in the petition. *Ib.*

3. Where in an action on a replevin bond, the court instructed the jury as follows: 1. That the records of the court show that a return of the property was awarded in the former action; 2. That such award of return was still in force, and that unless the defendants have returned the property or paid the value, they are liable; 3. That the petition of the plaintiff in the former suit, and the return of the sheriff, were proper evidence, and the latter conclusive of the facts therein stated, unless contradicted; 4. That if plaintiff proves that his property was replevied by H.—the principal in the replevin bond—and delivered to him, the defendants must prove the property returned, or paid for, or otherwise the verdict would be against them; and, 5. That in order to make a valid replevy, it was not necessary that the sheriff should actually take the property off from the premises of the defendant in the replevin; but if the plaintiff in the replevin was present when the property was replevied, and consented to the manner of the replevy, and the kind of delivery made to him, he

cannot now object to the validity of the levy; *Held*, That the instructions were not erroneous. *Ib.*

RETURN.

1. It is the duty of a person serving an original notice, to set forth in his return, all the acts by him done, in order that the proper tribunal may judge of their sufficiency. *Hedges v. Hodges*, 78.

2. A return that an original notice was served, or even *duly* served, is insufficient. The manner of service must be shown. *Ib.*

3. Where a defendant is not found, and service is made under section 1721 of the Code, the return on the original notice must state the time and manner of service—at whose house the copy of the notice was left, and the name of the person with whom it was left—or a sufficient reason must be given for omitting to do so. *Harmon v. Lee*, 171.

4. Where an original notice was returned as follows: "Served as to J. S., by leaving a copy with E. K., a person over fourteen years of age," and judgment by default, for want of an appearance, was rendered against J. S., for the sum claimed; *Held*, That the service was insufficient to give the court jurisdiction, or to authorize judgment against the defendant. *Ib.*

RIGHT.

1. In an action of right, the defendant cannot, in his answer, set up a title for the plaintiff, and plead to it, and compel the plaintiff to take issue with him on the title thus set up. *Gillis v. Black*, 439.

2. In an action of right, it is the duty of the defendant to admit or deny the claim of the plaintiff, and to set up his own. Upon these respective claims and denials they proceed to trial. *Ib.*

3. An answer in an action of right, which does not state what interest in, or title to, the premises, the defendant claims, as whether in fee simple, or otherwise, is fatally defective. *Ib.*

4. Where a party claims title to real estate, by virtue of occupancy and actual adverse possession, he should aver what length of time and possession he relies upon. *Ib.*

5. A defendant in an action of right, is not obliged to set out the details of his title, but only what he claims; but where he undertakes to show his title, he should give it such definiteness, that his adversary may be informed, and may be enabled to meet it. *Ib.*

6. Where a party claims title under the occupying claimant's act, he should show how that act creates a title originally, and facts and circumstances which show that the right could accrue to the party claiming the benefit of the act. *Ib.*

7. Where in an action of right the defendant answered, alleging that if plaintiff has any title to said land, it is based upon, and derived from, a certain decree of partition, made in the district court of Iowa Territory, in Lee county, on the 8th day of May, 1841, in said suit, wherein J. S. *et al.* were plaintiffs, and E. A. *et al.* were defendants, and that the said decree of partition was illegal, fraudulent and void, for the reasons following—setting out seventeen reasons; and where the defendant further pleaded, that he held the said lands by right of occupancy, and actual adverse possession, "for the length of time limited by law,"—by genuine title derived from an original half-breed Indian, of the Sac and Fox tribe of nations—

and by title derived by virtue of the occupying claimant's law, from the State of Iowa—and denied waste and cutting timber, and that defendant was liable in any manner; and where the plaintiff demurred to the answer for the following reasons: 1. The defendant cannot thus set up a title for the plaintiff, and compel him to take issue upon it; 2. The decree of partition cannot be thus impeached collaterally; 3. The statute of limitations, if relied upon, is not so pleaded as to be available, and defendant should state how long he has been in possession—which demurrer was sustained. *Held*, That the demurrer was properly sustained. *Ib.*

8. In an action of right, the plaintiff, where he holds the legal title and right of possession to real estate, may recover for the use and occupation of the land, as well as the title and possession. *Dunn v. Starkweather*, 466.

9. Under section 1288 of the Code, in relation to occupying claimants, a defendant in an action of right, can at any time, while in possession of the premises, file his petition to have the value of improvements made by him ascertained, and to obtain payment for the same, before surrendering the possession. *Ib.*

10. Where in an action of right, the parties, in writing, submitted the matters in controversy to arbitrators or referees, who were to examine the land and improvements thereon; to take testimony, if desired, in order to determine the value of the improvements; to ascertain the annual value of the use and occupation of the land, from the time the plaintiff's title accrued, until the first of March, 1857; and to ascertain and report at the next term of the district court, all the necessary facts upon which the court was to predicate its judgment; and where on the coming in of the report of the arbitrators or referees, the defendant made an affidavit, that the referees had not allowed him the just and true value of his improvements; that they were worth double the value reported by the referees; and that he believes that said referees, in arriving at the amount fixed by them, had omitted to take into consideration a part of the improvements made upon the land by defendant, whereby great injury and injustice would be done him, unless the matters were again referred to them for consideration—upon which affidavit was based an application to the court, to refer the matter anew to the arbitrators or referees, for a full and perfect report, and with direction to strike out so much of the report as awards rents and profits of the land to the plaintiff, which motion was overruled, and judgment rendered on the report in favor of the plaintiff, for the title and possession of the land, and for the defendant, for the value of the improvements, as ascertained by the referees, after deducting the rents; *Held*, That the application was properly overruled. *Ib.*

ROAD DISTRICT.

1. Under sections four and five of the act entitled "An act to amend an act entitled 'An act to incorporate the city of Davenport,'" approved January 22, 1856, there is no road district distinct from the city; nor has the city an existence as a corporation, distinct from its existence as a road district. *Rusch v. The City of Davenport*, 443.

2. Although a road district may not be obliged to keep the whole of a highway, from one boundary to another, free from obstructions, and fit for the use of travelers, yet as convenience and safety are the essential conditions of a well-maintained highway, both at common law, and by statute, if a bridge is built of greater width than is required by the statute, where the exigencies of travel seem to require it, it must be kept in good condition for its whole width. *Ib.*

3. The necessities of travel may require a bridge to be wider than sixteen feet; and section 517 of the Code, which provides that "bridges are parts of the public highways, and must be not less than sixteen feet," does not mean that a road district is, in no case, required to construct its bridges more than sixteen feet wide. *Ib.*

4. Where in an action against a road district for the recovery of damages, for an injury resulting from a defective bridge, the defendant asked the court to instruct the jury substantially as follows: "That the city of Davenport, as a road district, was not bound to keep the bridge in a suitable condition for crossing, for a greater width than sixteen feet," which instruction was refused; *Held*, That the court properly refused the instruction. *Ib.*

SCIRE FACIAS.

1. In *scire facias* on a judgment, the judgment on its face, imports absolute verity, and cannot be impeached by any matter going behind it; but the defendant may plead matters arising subsequent to the rendition of the judgment sought to be revived. *Vredenburg v. Snyder*, 89.

2. Where a judgment is joint, and one of the defendants is dead, the plaintiff may revive the judgment against the other defendant, without making the personal representatives of the deceased debtor, a party to the proceedings in *scire facias*. *Ib.*

3. In *scire facias* against one of two joint judgment debtors, the other being dead, the failure of the plaintiff to present his claim against the estate of the deceased debtor, and have the same allowed—the estate being amply sufficient for the payment of debts, is no sufficient cause against the issuing of execution on the judgment, against the surviving debtor *Ib.*

4. No damages are recoverable in *scire facias*, for delay of execution. The plaintiff recovers costs, but no damages. *Ib.*

5. In *scire facias*, the judgment should be that the plaintiff have execution for the judgment described in the *scire facias*, and his costs. *Ib.*

6. Where a *scire facias* recited, that at the September term of the district court of Marion county, A. D. 1854, an indictment was preferred by the grand jury against one A. T. S. for larceny; that at the next April term of said court, the said defendant appeared, and upon affidavit filed, moved for a change of venue in the cause; that the venue was changed by the court to Monroe county; and the said A. T. S., together with T. L. S. his surety, in open court, entered into a recognizance, whereby they acknowledged themselves indebted to the State of Iowa in the sum of \$500, to be void on condition that the said A. T. S., indicted as aforesaid, but who, *by mistake in the recital of said recognizance*, is stated to have been indicted at the April term of said district court, instead of the *September term*, and who had obtained a change of venue to the county of Monroe, should be and appear at the next term of the district court for Monroe county, and not depart without leave of the court; which said bond was duly taken and approved, and remains of record; and that at the said next ensuing term of the district court for Monroe county, the said A. T. S. not appearing, according to his said recognizance, to answer to said indictment, when solemnly called, but wholly neglecting and refusing so to do, his default was entered of record, and his said recognizance forfeited; and where T. L. S., the only defendant served, appeared and answered, denying the truth of the matters set out in the *scire facias*; that there was any such record as was averred; that there was any mistake in the recital of the recognizance, as to the term of the court at which the indictment was found; and that the said T. L. S. ever

became the surety of the said A. T. S. upon any bond to appear and answer any indictment, except the one found and presented by the grand jury of Marion county, at the April term, 1855—upon which answer issue was joined; and where the cause was submitted to the court upon the record and evidence, and was taken under advisement, to be decided in vacation; and where, in vacation, the court decided that the said T. L. S. had failed to show cause, and rendered judgment against him for the amount of the recognizance, and costs; *Held*, That there was no error in the record. *The State v. Strong*, 72.

7. In a proceeding by *scire facias*, to revive a judgment in an action of right, and show cause why execution should not issue, a party to whom the property has been conveyed by the judgment defendant, subsequent to the judgment, and who is in possession, is a proper party defendant with the defendant in the judgment. *Von Puhl et al. v. Rucker et al.*, 187.

8. The judgment on the *scire facias*, where it is sought to revive a judgment in an action of right, is that the plaintiff have execution against the person succeeding to the possession. It is not a judgment of recovery. *Ib.*

9. In answer to a writ of *scire facias*, issued under the fifth section of the act authorizing mill dams, approved January 24, 1855, requiring the party to appear and show cause, &c., a defendant cannot assign as cause against the granting of the license to erect a dam, matters legitimately involved in the question of damages submitted to the jury, and pertinent only on application to set aside the finding of the jury, and award a new inquiry of damages. *Gammell v. Potter*, 548.

10. In answer to a writ of *scire facias*, the defendant may allege and prove, as sufficient cause why a license for the erection of a mill dam should not be granted by the court, facts which tend to show that the same would be unreasonable, or that the dam, if built, would not be for the public benefit. *Ib.*

11. In proceedings under the act entitled "An act authorizing mill dams," approved January 24, 1855, matters that are intended to show improper interference by the plaintiff with the jury, and mistake or misconduct on the part of the jury themselves, in ascertaining the damages, do not amount to the sufficient cause contemplated by section five of the statute, why leave should not be granted to build the dam, but come more properly before the court, on an application to set aside the inquisition and award a new writ of *ad quod damnum*. *Ib.*

SEDUCTION.

1. A father may maintain an action for the seduction of his daughter, after she has attained her majority, if the seduction took place while she was a minor. *Stevenson v. Belknap*, 97.

2. The attaining the age of majority by the daughter, does not take away the father's right of action; nor is it either taken away or negatived by the provisions of the statute, which gives to the unmarried female the right to prosecute an action for her own seduction. *Ib.*

3. In an action by the father for the seduction of his minor daughter, brought after the female has arrived at her majority, the damages of the father are not restricted to the loss of service, and the actual expenses incurred, but he may recover exemplary damages. *Ib.*

4. Where actions for the seduction are brought both by the father and daughter, the jury may consider every fact which goes to the injury of the plaintiff, whether in mind, body, or estate, and may give damages com-

mensurate with the injury sustained. In each case, the proof will be confined to the damages resulting to the plaintiff alone, and not to another, nor to the plaintiff, jointly with another. *Ib.*

5. In cases of seduction, where the female is a minor, the injury to the father is distinct from the injury to the daughter. They are different in character, and there is nothing incompatible, or inconsistent, in the idea of both resulting from the wrongful act of the same party. *Ib.*

6. In an action by a father, for the seduction of his minor daughter, it may be shown to the jury, in aggravation of damages, that the defendant visited the daughter as a suitor, and used arts, flattery, persuasion and promises, to induce her to have connection with him. *Ib.*

7. In such an action, damages may be given, not only for the loss of services, and actual expenses incurred, but also on account of the wounded feelings of the plaintiff, and his anxiety, as the parent of other children, whose morals may be corrupted by the example. *Ib.*

6. Where, in an action by a father for the seduction of his minor daughter, the defendant asked the court to instruct the jury as follows: "That if the daughter was a minor at the time of the seduction, and the suit was not brought by the father during her minority, that then the right of action was in the daughter alone, and the action cannot be maintained by the father," which instruction was refused by the court; *Held*, That the instruction was properly refused. *Ib.*

SERVICE.

1. Where in an action to foreclose a mortgage, it appeared from the return on the original notice, that the defendants demanded a copy of the petition, and required it to be sent to J. F. S., attorney, Keosauqua, Iowa; and where, at the appearance term of the court, it was made to appear, that a copy of the petition had been sent by mail to the residence of defendants, and that defendants had failed to answer, and thereupon a decree *pro confesso* was rendered against them; *Held*, That there was no sufficient service, and the judgment was irregular. *Woodward v. Whitecarver et ux.*, 1.

2. Where a judgment is taken by default, it should appear affirmatively, that there has been such service and compliance with the provisions of the law, as gives the court jurisdiction over the person of the defendant; and it is clearly irregular to take such judgment, where the record discloses the fact, that there has not been such service and compliance. *Ib.*

3. A defendant, at the time of the service of the original notice, has a right to demand a copy of the petition, and to require that it be sent to a particular person, at a given place; and it is irregular to take a decree or judgment by default, when it appears that the copy of the petition was sent to another person at a different place. *Ib.*

4. It is the duty of a person serving an original notice, to set forth in his return, all the acts by him done, in order that the proper tribunal may judge of their sufficiency. *Hedges v. Hedges*, 78.

5. A return that an original notice was served, or even *duly* served, is insufficient. The manner of service must be shown. *Ib.*

6. Where a defendant is not found, and service is made under section 1721 of the Code, the return on the original notice must state the time and manner of service—at whose house the copy of the notice was left, and the name of the person with whom it was left—or a sufficient reason must be given for omitting to do so. *Harmon v. Lee*, 171.

7. Where the requirements of the statute as to service, are not observed, the defendant is not in court, and any judgment against him is erroneous. *Ib.*

8. Where an original notice was returned as follows: "Served as to J. S., by leaving a copy with E. K., a person over fourteen years of age," and judgment by default, for want of an appearance, was rendered against J. S., for the sum claimed; *Held*, That the service was insufficient to give the court jurisdiction, or to authorize judgment against the defendant. *Ib.*

9. In cases where there is no personal service on the defendant, and he is served by publication, the mailing of a copy of the petition and notice to the defendant, as required by section 1826 of the Code, is an essential part of the service, the proof of which, or in excuse of which, should appear of record in the case; and the record should further show, that such proof had been made, before a default was entered against the defendant. *McGahan v. Carr*, 331.

10. The property of one person cannot be divested, and vested in another, in an *ex parte* proceeding, unless the record in the cause, shows that section 1826 of the Code was strictly complied with, or the decree recites and shows affirmatively, that copies of the petition and notice were directed to the defendant, as required by that section, or an excuse for not so mailing them, before a default entered. *Ib.*

SHERIFF'S SALE.

1. Where an execution plaintiff purchases at sheriff's sale, real estate, which at the time of the sale was supposed to belong to the defendant, but to which he had no title, and the amount of the bid is credited upon the judgment, the plaintiff may recover back from the defendant the amount of the purchase money. *Reed & Co. v. Crosthwait*, 219.

2. Where in an agreed case, it appeared that the plaintiffs recovered a judgment against the defendant for the sum of \$205.76; that an execution was issued on said judgment, and levied on an eighty acre tract of land, supposed to be the property of the defendant; that the land was bid off and purchased by the plaintiffs at the sheriff's sale, for the sum of \$75, which amount was credited on their judgment; that the plaintiffs received a certificate of purchase from the sheriff, but have never received any deed; and that the defendant never had any title to the land; *Held*, That the plaintiffs could recover from the defendant the amount bid on the land, and credited on the judgment. *Ib.*

SPECIFIC PERFORMANCE.

1. J. P. had a number of sons, and had helped all of them, either by giving them land, or means with which to enter the same, or start in business. One of the sons, L., (a twin brother of A.), died in 1843 or 1844, being unmarried, and leaving no issue. L. at the time of his death, was in the possession of eighty acres of land, and held the title, either legal or equitable, as also another tract of land. Whether the legal title was in the father, and the equity in the son, or whether the father's legal title accrued upon the death of L., and as his heir at law, did not satisfactorily appear. The improvements upon the eighty acres, at the time of the death of L., were put there by him, and there was nothing to show that the father had ever expended a dollar upon the land. On his death-bed, L. desired that his father should see that his interest in this eighty should be given to A., and this desire the father promised should be carried out. His other land, L., desired should be given to his brother J. After his brother's death, A. took possession and made large improvements upon the eighty acre tract,

consisting of fencing, and a barn, at an expense of some \$1,000 or \$1,200. During all this time, the father resided near the premises, and had full knowledge of the possession and improvements. On two or three occasions he expressed his intention to carry out the will of L., in relation to the eighty, and he uniformly spoke of it as A.'s. A. continued in possession, and enjoyed the rents and profits, to the time of his leaving for California, and after that, it was occupied by his tenants—this possession covering a period of some twelve or fourteen years. In 1854, by correspondence, A. sold the eighty acre tract, with other lands, to M. While M. was negotiating with A., knowing that the legal title was in the father, he called upon him, and obtained his promise to make the deed. Subsequent to this, the father spoke to other persons of M.'s trade with A., and stated that he was glad that M. was to get the place, and that he had agreed to help him make the payments. On bill filed by M. against the father, to compel a specific performance of the promise to make a deed; *Held*, That J. P. should be required to make the deed to M. *Moore v. Pierson et al.*, 279.

STATUTE OF LIMITATIONS.

1. The word "hereafter," in section 1672 of the Code, in relation to the time of commencing an action, has reference to the time when the Code took effect, and not to the time of its passage. *Bennett v. Bevard*, 82.

2. The object of section 1672 of the Code, was to prevent the application of the general rule, contained in section 1671, to causes of action which had accrued prior to July 1, 1851, but were not yet barred, without giving a reasonable time, after the taking effect of the Code, within which to bring the action. *Ib.*

3. Under section 1672, a party is entitled to *at least* half the time specified in the Code, for the commencement of his action, after the Code took effect. *Ib.*

4. If, upon the expiration of half the time specified by the Code, the whole period allowed by the first section (1659) of chapter 99, counting from the time the cause of action accrued, has not expired, then the party may sue at any time before that period expires. *Ib.*

5. An action was commenced on three promissory notes, two of which were dated February 2, 1850, and the other April 24, 1851, and all became due in one day after their respective dates. The original notice was delivered to the sheriff, November 24, 1856, and returned not served, May 18, 1857, the defendant not being found; service was made on the defendant on the 12th of September, 1857. The defendant pleaded the statute of limitations: *Held*, That none of the notes were barred by the statute of limitations. *Ib.*

6. Where the jurisdiction is concurrent, courts of equity, equally with courts of law, are bound by the statute of limitations; and they act in obedience to the statute, rather than by way of analogy to the law. *Ib.*

7. Where in a chancery proceeding, the bill states a case within the statute of limitations, the objection may be taken in a defense by demurrer. *Phares v. Walters*, 106.

8. If a complaint in chancery, be within any of the exceptions of the statute of limitations, it is his duty to state it in his bill. *Ib.*

9. An action to recover dower is included within the general statute of limitations, (chapter 99 of the Code), and will be barred in the same time with other actions for the recovery of real property. *Ib.*

10. It was the intention of the legislature to make the statute of limitations (chapter 99 of the Code), retrospective. *Ib.*

11. Section 1672 of the Code was intended to apply to causes of action accruing before the Code, and not then barred, where the period of limitation is enlarged; and in such cases, whether the right of action, (if on a promissory note), had accrued one day, or five years, the party is entitled to *at least* five years after the Code took effect, in which to commence his suit, and as much longer as would make ten years from the time the right of action accrued. *Ib.*

12. So, section 1673 applies to those cases where the period is not enlarged by the Code; and under it, (in actions for the recovery of real property), a party is confined to twenty years from the time the cause of action accrued, if it accrued before the taking effect of the Code; but if such twenty years would run beyond ten years from July 1, 1851, it is not to so run, but would expire July 1, 1861, and as much short of that time as, counting from the period the right of action accrued, for twenty years, it would fall short. *Ib.*

13. Action for the recovery of dower, commenced October 2, 1857. The petition alleged that the death of the husband took place October, 1842. Demurrer to the petition, on the ground that upon the facts stated therein, the petitioner's claim was barred by the statute of limitations. Demurrer overruled; *Held*, That the demurrer was properly overruled. *Ib.*

14. Where a party seeks to recover for money paid as surety for another, his cause of action accrues at the time when the money is paid; and from that time, the statute of limitation commences to run. *Walker, Adm'r, v. Lathrop*, 516.

15. Where in an action to recover money paid as surety for the defendant, under a judgment rendered in April, 1849, the answer alleged: 1. That more than ten years had elapsed since the recovery of the said judgment; 2. That the defendant did not *undertake and promise* at any time within five years, or within ten years, or at any time since the taking effect of the Code; and the court found for the plaintiff, and rendered judgment in his favor; *Held*, That the judgment was correct. *Ib.*

STOPPAGE IN TRANSITU.

1. The vendor's right of stoppage *in transitu* continues until the goods have reached the buyer. When the transit is at an end, the delivery is complete, and the right of stoppage gone; but until the goods have reached their place of ultimate destination, as agreed upon by the buyer and seller, they are ordinarily liable to stoppage. *O'Neil v. Garrett*, 480.

2. The right remains not only while the goods are in motion, and not only while they are in the hands of the carrier, but while they are in the hands of a warehouseman, or place of deposit, connected with their transmission or delivery; or in any place, not actually or constructively the place of the consignee, or not so in his possession or under his control, that the putting them there implies the intention of delivery. *Ib.*

3. A delivery to a warehouseman or wharfinger, at the place of the ultimate destination of the goods, who does not receive them as the mere agent of the buyer, but in the ordinary course of his business as a middle man, is not a constructive delivery to the purchaser, so as to put an end to the right of stoppage *in transitu*. *Ib.*

4. The vendor's right of stoppage *in transitu* is not divested by the levy of an attachment against the purchaser of the goods before they come in-

to his possession. The vendor has the preference over the legal process of a general creditor, although but for the suit, the goods would have fallen into the hands of the vendee. *Ib.*

5. Where in an action of replevin by a vendor, to recover the possession of goods sold on credit, the vendee having become insolvent before delivery, against a sheriff, who claimed to hold the goods under attachments against the vendee, the plaintiff asked the court to instruct the jury as follows: "That if O. & C. (warehousemen), received the goods from the railroad company, in the usual course of their business as commission merchants, for storage, and not as the agents of H., (the vendee), and had no authority from H. to receive the goods, and were not the agents of H., then the right of stoppage *in transitu* was not determined, and plaintiff had a right to stop them by writ of replevin, provided the said H. became insolvent before the arrival of the goods, and after he purchased them," which instruction was refused; *Held*, That the court erred in refusing the instruction. *Ib.*

6. And where in such an action, the court instructed the jury as follows: 1. "That if the goods were delivered to O. & C., and were held by them subject to the order of H., and were attached by defendant in a suit against H., before plaintiff claimed and got possession of the goods, then the attaching creditors of H. will hold said goods as against the plaintiff in this suit;" *Held*, That the court erred in giving the instruction. *Ib.*

SUBSTITUTION.

1. While there is no provision of the Code, expressly giving the power to order the substitution of the true name of a party, when ascertained, yet it is entirely competent for the court to so direct, under the numerous and liberal provisions which give the right to amend pleadings, or any paper in a case. *Arbuckle v. Bowman et al.*, 70.

SWAMP LANDS.

1. The provision in the act entitled "An act in relation to the swamp lands of this State," approved January 24, 1857, which provides that the act shall not apply to the actual settlers on said lands at the time of the passage of the act, has legal reference to the time of the taking effect of the act, and not to the time of its passage. *Rogers v. Vass*, 405.

2. The district court possesses jurisdiction to set aside a certificate of pre-emption, granted by the county judge, under the act entitled "An act to prevent trespass or waste on swamp or other lands in the State of Iowa, and for other purposes," approved January 25, 1855, where the same has been obtained by fraud and misrepresentation. *Ib.*

3. In a proceeding to set aside a certificate of pre-emption of swamp lands, granted by a county judge, on the ground that the same was obtained by fraud and misrepresentation, it is not necessary to make the county judge a party. *Ib.*

4. Where a party who has obtained a certificate of pre-emption of swamp lands, has not complied with the statute, and had no right of pre-emption, it is competent for any one to enter upon the land, make his improvements and claim the pre-emption, although such entry and improvements were made after the granting of the certificate. *Ib.*

5. Where a party claiming a right of pre-emption to certain lands, brought his bill in equity to set aside a certificate of pre-emption of the land, granted by a county judge, alleging that, on the first of June, 1857, and immediately subsequent thereto, he *bona fide*, commenced and built a dwelling on the said land, with the intent to reside thereon, and cultivate

the same; that within sixty days thereafter, he filed his claim before the county judge of Fremont county, and offered proof of his improvement, but the county judge refused to grant him a certificate of pre-emption, or to allow his claim, upon the alleged ground that the respondent had, before that time, received a certificate of pre-emption to three-quarters of the same quarter; that the said respondent had not made any improvements or settlement upon the said land; and that his certificate was obtained by fraud and misrepresentation, and was void; to which bill there was a demurrer, which was sustained by the court; *Held*, That the court erred in sustaining the demurrer. *Ib.*

TAX SALE.

1. The revenue act of 1847, was repealed by the Code, without any saving of the remedies existing at the time of the repeal, for the collection of taxes levied and delinquent; and there was no authority under the Code, for selling in 1852, lands delinquent for the taxes of 1848. *Bleidorn v. Abel et al.*, 5.

2. A county treasurer's deed of real estate, made under a sale in 1852, for the delinquent taxes of 1848, conveys no title to the purchaser at such sale. *Ib.*

3. Under the revenue act of 1847, there could rightfully be no judgment against, or sale of the lands, in 1852, for the unpaid taxes of 1849 and 1850. Such a sale could only take place in pursuance of a judgment in the district court, against the lands, for the taxes due and unpaid, which judgment could only be rendered upon a return of the county treasurer, showing that the taxes had remained due and unpaid for the term of two years from the first day of January next, after the delinquent list had been filed in his office. *Ib.*

4. A sale of lands in 1852, by a county treasurer, for the delinquent taxes of 1849 and 1850, derives no support from the provisions of the Code, as under section 496, the treasurer was authorized to sell in each year, only the lands on which the taxes levied the preceding year, remained unpaid. *Ib.*

5. No authority to sell lands for the unpaid taxes of any year prior to 1851, was vested in the county treasurers, until the passage of the act entitled "An act to enforce the claims of the State and county against lands and lots, on which the owners have failed to pay the taxes charged thereon, prior to 1851," approved January 22, 1853. *Ib.*

6. A decree of foreclosure under a tax deed for lands sold in 1852, for the delinquent taxes of 1851, will not affect the interest of any person claiming a title to, or lien upon the lands, previous to the tax sale, not a party to the suit. *Ib.*

7. In proceedings to foreclose the equity of redemption under a tax deed, as in proceedings to foreclose a mortgage, all incumbrances, whether prior or subsequent, not made parties, are not bound by the decree. *Ib.*

8. In a proceeding by an assignee to foreclose a mortgage, as against the mortgagor, and other parties claiming title under a tax deed, under the Code, which tax deed has been foreclosed against the mortgagor, and where the conclusive effect of the decree of foreclosure under the tax deed, depends upon the fact, whether or not the complainant was a prior incumbrancer upon the land, the respondents, who claim under the tax title, are entitled to demand that the complainant makes out his right to a decree against the mortgagor, by sufficient testimony. *Ib.*

9. In a proceeding to foreclose the equity of redemption in lands sold

for taxes, against the property itself, the land should be designated and described, not only in the notice contemplated in sections 506, 1715 and 2088 of the Code, but also in the publication provided for by sections 507 and 1725. *Gaylord v. Scarff*, 179.

10. Where the proceeding to foreclose is against the land itself, under section 507 of the Code, and it is against certain named lots of land, *and others*, not describing them, the court will not acquire jurisdiction as to the parcels of land not described, nor will the property be bound by the decree rendered in such proceeding. *Ib.*

11. Where it is sought to divest the title to real estate, on account of the non-payment of taxes, a strict compliance with the law is essential. *Ib.*

12. In a proceeding against real estate, to foreclose the equity of redemption, under a tax sale, in order to bind the property, it should be proceeded against by description, and the notice should specify and make known, that the plaintiff was seeking to foreclose the equity of redemption of the owner in and to said property, describing it, so that the owner may have an opportunity of knowing that his title is about to be divested. *Ib.*

13. Under section 508 of the Code, a decree of foreclosure, under a tax deed, is conclusive in the same degree as in other actions. *Ib.*

14. In a proceeding to foreclose the equity of redemption under a tax deed, the defendant may show that the taxes were paid prior to the sale. *Ib.*

15. Section 509 of the Code, applies to those cases where payment of the taxes before sale, is shown prior to the rendition of the decree. *Ib.*

16. After the rendition of a decree of foreclosure under a tax deed, where the court is shown to have jurisdiction, the owner is concluded from showing in a subsequent proceeding, the payment of the taxes prior to the sale. *Ib.*

17. As the non-payment of the taxes is the essential fact upon which the power to sell rests, the decree of foreclosure necessarily includes within it, the finding of that fact, and must be conclusive. *Ib.*

18. After the Code went into operation, and prior to the taking effect of chapter 74 of the acts of 1853, there was no power to sell lands for the delinquent taxes of any year prior to 1851. *Ib.*

19. Whether under a sale of lands for delinquent taxes, made under chapter 74 of the acts of 1853, the purchaser can proceed to foreclose the equity of redemption of the owner, by action in the manner provided by the Code, *quære?* *Ib.*

20. The fact that the treasurer of a county made a mistake, and deceived the agent of the owner, in representing that certain land was not assessed, and that no taxes were to be paid on it for a given year, cannot avail the owner, in a proceeding to set aside a decree of foreclosure against the land, under a tax deed, for the taxes of that year, unless some collusion or fraudulent combination be shown between the treasurer and the purchaser of the land. *McGahan v. Carr*, 881.

21. Nor can the fact, that the land was assessed in the name of a wrong person, or that the owner, since the sale of the land for taxes, has paid the subsequent taxes on the same, avail to set aside a decree of foreclosure under a tax deed. *Ib.*

22. To sustain a title under a sale for taxes, under a statute authority, in derogation of the common law, every requisite of the statute, having the semblance of benefit to the owner, must be strictly complied with, and the claimant under such a title, must prove that all the requisites of the law have been complied with; and unless the steps which the law requires to be taken, have been regularly pursued, the court has no jurisdiction under the statute, to divest a party of his property and vest it in the State, or another person. *Ib.*

23. Although a decree of foreclosure under a tax deed, may recite that it "appeared to the court, that the defendant had been served with notice of the pendency of the suit as required by law," the complainant, in a proceeding to set such decree aside, may aver and prove, that copies of the petition and notice were never directed to him as required by section 1826 of the Code; and that the proof required, was not made, nor any excuse shown, before taking a default against him. *Ib.*

24. Where in a proceeding to set aside a decree of foreclosure under a tax deed, the petition alleged that in 1852, complainant purchased the lands in controversy; that he was then, and continued to be, a resident of the State of Virginia; that for the year 1853, the said lands were assessed to G. and not to the complainant, the taxes amounting to \$1,93; that in 1854, his agent called upon the proper officer, to pay the taxes on said land, and was informed that said land was not assessed, and no taxes were to be paid for the year 1853; that in May, 1854, the treasurer sold said lands for the delinquent taxes of 1853, to the defendant, who, on the 9th of June, of that year, received the said treasurer's deed; that on the 24th of March, 1855, said defendant filed in the district court, his petition to foreclose the complainant's equity of redemption in and to said land; that a notice directed to complainant, was placed in the hands of the sheriff, who returned thereon that said defendant (now complainant), was not found within his county: that at the next April term of said court, an order was entered, continuing said cause until the next term, and directing publication to be made, as required by law; that at the November term, 1855, of said court, the said published notice, with the affidavit of the publisher, was filed, and thereupon default was entered against this complainant, and a decree rendered in favor of the then plaintiff, for the land; that during all this time, complainant was a resident of the State of Virginia; that he had no knowledge of the levy of said taxes, nor of the purchase by defendant of said land; that he was ignorant of the institution or pendency of said suit, or of the judgment, until the spring of 1857; that he paid the taxes for the years 1854, 5 and 6; that the notice by publication was not given, as required by law; that at the time of the rendition of said judgment, no proof was made to said court, that a copy of the petition and notice had been sent to the defendant, nor excuse shown for not sending the same; that no such copies ever were sent, in fact; and that said defendant neglected and refused to send complainant copies of the petition and notice, for the purpose of obtaining said decree, without the knowledge of this complainant—to which petition was attached a copy of the decree under the tax deed, which decree, (among other things) recited "that defendant being called, came not, but made default, and it appearing to the court, that defendant had been served with notice of the pendency of this suit, as the law directs; and where the court sustained a demurrer to, and dismissed the bill; *Held*, That the court erred in dismissing the bill. *Ib.*

TITLE.

1. A county treasurer's deed of real estate, made under a sale in

1852, for the delinquent taxes of 1848, conveys no title to the purchaser at such sale. *Bleidorn v. Abel et al.*, 5.

2. In an action to recover the possession of real property, brought by the person holding the legal title, an equitable title is no defence against the legal one. *Page v. Cole*, 153.

3. Where an execution plaintiff purchases at sheriff's sale, real estate, which at the time of the sale was supposed to belong to the defendant, but to which he had no title, and the amount of the bid is credited upon the judgment, the plaintiff may recover back from the defendant the amount of the purchase money. *Reed & Co. v. Crosthwait*, 219.

4. Where in an agreed case, it appeared that the plaintiffs recovered a judgment against the defendant for the sum of \$205,76; that an execution was issued on said judgment, and levied on an eighty acre tract of land, supposed to be the property of the defendant; that the land was bid off and purchased by the plaintiffs at the sheriff's sale, for the sum of \$75, which amount was credited on their judgment; that the plaintiffs received a certificate of purchase from the sheriff, but have never received any deed; and that the defendant never had any title to the land; *Held*, That the plaintiffs could recover from the defendant the amount bid on the land, and credited on the judgment. *Ib.*

5. In an action of right, the defendant cannot, in his answer, set up a title for the plaintiff, and plead to it, and compel the plaintiff to take issue with him on the title thus set up. *Gillis v. Black*, 439.

6. In an action of right, it is the duty of the defendant to admit or deny the claim of the plaintiff, and to set up his own. Upon these respective claims and denials they proceed to trial. *Ib.*

7. An answer in an action of right, which does not state what interest in, or title to, the premises, the defendant claims, as whether in fee simple, or otherwise, is fatally defective. *Ib.*

8. A defendant in an action of right, is not obliged to set out the details of his title, but only what he claims; but where he undertakes to show his title, he should give it such definiteness, that his adversary may be informed, and may be enabled to meet it. *Ib.*

9. Where in an action of right the defendant answered, alleging that if plaintiff has any title to said land, it is based upon, and derived from, a certain decree of partition, made in the district court of Iowa Territory, in Lee county, on the 8th day of May, 1841, in said suit, wherein J. S. *et al.* were plaintiffs, and E. A. *et al.* were defendants, and that the said decree of partition was illegal, fraudulent and void, for the reasons following—setting out seventeen reasons; and where the defendant further pleaded, that he held the said lands by right of occupancy, and actual adverse possession, “for the length of time limited by law,”—by genuine title derived from an original half-breed Indian, of the Sac and Fox tribe of nations—and by title derived by virtue of the occupying claimant's law, from the State of Iowa—and denied waste and cutting timber, and that defendant was liable in any manner; and where the plaintiff demurred to the answer for the following reasons: 1. The defendant cannot thus set up a title for the plaintiff, and compel him to take issue upon it; 2. The decree of partition cannot be thus impeached collaterally; 3. The statute of limitations, if relied upon, is not so pleaded as to be available, and defendant should state how long he has been in possession—which demurrer was sustained. *Held*, That the demurrer was properly sustained. *Ib.*

TRESPASS.

1. In trespass, where the defendant answers, denying the trespass, as alleged in the plaintiff's petition, and alleging matter in justification, the

plea of justification does not confess the trespass, so as to dispense with proof of it on the part of the plaintiff. *Grash v. Sater et al.*, 801.

2. Where in an action of trespass, for taking personal property, the defendants filed a joint answer, denying the allegations of the petition; and where, at a subsequent term, without any leave to amend their answer, or to file a new answer, being granted, one of the defendants filed a separate answer, admitting the taking, and justifying under a writ of attachment, and the other two defendants filed a joint further answer, justifying under the other defendant, to which answer there was a replication; and where the court instructed the jury, that under the pleadings the trespass was admitted, and plaintiff need not prove it; and that plaintiff had a right to recover, unless the defendants had proved the matter of justification; *Held*, That the last answers were not intended as a waiver of the answer in denial, and that the court erred in giving the instruction. *Ib.*

TROVER.

1. Where in an action of trover against an officer, for the conversion of two horses, the defendant answered, alleging that he took two horses, as sheriff of D. county, from the possession of plaintiff, as the property of B., by virtue of a writ of attachment in favor of J. & S., in an action brought by them against B., and which was still pending, and that he sold the said horses as such sheriff, by virtue of the proceedings in said action; and also denying that plaintiff was the owner of said horses, and that defendant converted them to his own use; and where the defendant asked the court to instruct the jury, as follows: "That the plaintiff, in order to recover, must show that he owned the horses, and that defendant converted them, or the proceeds thereof, to his own use," which instruction the court refused, as follows: "Refused, because a conversion of the horses, or the proceeds, so as to deprive the plaintiff of them, would be sufficient, if the jury are satisfied that he was the owner, and entitled to the possession:" *Held*, That the gist of the instruction was that the sheriff must convert to his own use, and that the instruction was properly refused. *Nutter v. Rickette*, 92.

2. Where in action of trover against an officer, for the conversion of two horses, the defendant justified under a writ of attachment against B.; and where testimony was introduced, tending to show that the plaintiff was in the employment of the owner, or owners, of a circus; that he bought one of the horses, (Young Alick), from one H.; that when the plaintiff paid the first one hundred dollars of the purchase money, he went to the clerk of the circus and obtained it; and that when he paid the balance, (one hundred and forty-five dollars), some time after, he did it by giving H. an order on the same clerk; and thereupon the defendant asked the court to charge the jury as follows: "That if the jury believe, that at the time of the sale of the spot horse, (Young Alick), by H., the plaintiff went with H. to the clerk of the circus, and obtained from the clerk one hundred dollars, and handed it over to H. as part of the purchase money; and if the jury further believe, that at Milwaukee, the said H. got the balance, one hundred and forty-five dollars on the plaintiff's order, through the same clerk, these are such circumstances as to warrant the jury in treating the sale as a sale to the owner, or owners of the circus, and not as a sale to plaintiff; which instruction the court refused to give; *Held*, That there was no error in refusing the instruction. *Ib.*

TRUSTEE.

1. Where personal property is left with a widow, as the head of a family, for the benefit of herself and children, she holds it as trustee for the

heirs, and either has no power to sell, or if she has, she must be held to account to the children for their interest in the same. *Wilmington, Adm'r, v. Sutton*, 44.

2. Where a party holds the legal title to real estate in trust for another, who has executed a bond for the conveyance of the same, and received the purchase money, and where the trustee conveys the land in accordance with the requirements of the bond, he cannot set aside the deed, on the ground that he was a minor when the deed was executed; nor for the reason that the bond was obtained from the party holding the beneficial interest in the land, by fraud and duress. *Prouty v. Edgar*, 858.

3. In equity, an infant who holds the legal title to land, as trustee, may be compelled to convey the same. *Ib.*

VARIANCE.

1. Where in an action to recover damages for the fraud and misrepresentation of the defendant, in the sale of a certain parcel of real estate, describing it, the plaintiff attached to his petition a deed from the defendant, conveying *two* parcels of land to the plaintiff, and the defendant asked the court to instruct the jury as follows: "That there is a material variance between the contract alleged in the petition, and that contained in the deed introduced in evidence, and it is the duty of the jury to render a verdict for the defendant," which instruction the court refused to give; *Held*, That there was no variance between the deed and the allegations of the petition, and that the instruction was properly refused. *Jones v. Smith*, 229.

2. And where in such an action, the plaintiff averred that he paid four hundred dollars for the one tract of land, for the fraud in the sale of which he claimed damages, when it appeared from the deed offered in evidence, that that sum was the consideration of both tracts; *Held*, That the sum named in the deed was not conclusive as to the consideration, and that there was no variance. *Ib.*

3. It is within the discretionary power of a court to refer a question of variance as to the date of a written instrument, which the court is unable to determine, to the jury. *Partridge v. Patterson*, 514.

4. Where in an action on a promissory note, the defendant objected to the admission of the note in evidence, upon the ground of an alleged variance between the date of the indorsement of the note and that of the copy attached to the petition; and where the court, being unable to determine, on account of the peculiar manner in which the figures were made, submitted the question of variance to the jury, under proper instructions; *Held*, That the proceeding was not erroneous. *Ib.*

VENDOR AND VENDEE.

1. A vendor of real estate, when the purchase money remains unpaid, is not compelled to pursue the course indicated in sections 2068, 2094, and 2095 of the Code. Those sections do not take away his other rights; they only provide for certain matters, in case he resorts to that remedy. *Page v. Cole*, 158.

2. Where a vendee takes possession of real estate, with the consent of the vendor, and fails to pay the purchase money in accordance with the terms of the contract, the vendor can sustain an action against the vendee, to recover the possession, without returning so much of the consideration as may have been paid, or tendering to the vendee his notes for the purchase money. *Ib.*

3. The vendor's right of stoppage *in transitu* continues until the goods

have reached the buyer. When the transit is at an end, the delivery is complete, and the right of stoppage gone; but until the goods have reached their place of ultimate destination, as agreed upon by the buyer and seller, they are ordinarily liable to stoppage. *O'Neil v. Garrett*, 480.

4. The right remains not only while the goods are in motion, and not only while they are in the hands of the carrier, but while they are in the hands of a warehouseman, or place of deposit, connected with their transmission or delivery; or in any place, not actually or constructively the place of the consignee, or not so in his possession or under his control, that the putting them there implies the intention of delivery. *Ib.*

5. A delivery to a warehouseman or wharfinger, at the place of the ultimate destination of the goods, who does not receive them as the mere agent of the buyer, but in the ordinary course of his business as a middle man, is not a constructive delivery to the purchaser, so as to put an end to the right of stoppage *in transitu*. *Ib.*

6. The vendor's right of stoppage *in transitu* is not divested by the levy of an attachment against the purchaser of the goods before they come into his possession. The vendor has the preference over the legal process of a general creditor, although but for the suit, the goods would have fallen into the hands of the vendee. *Ib.*

7. Where in an action of replevin by a vendor, to recover the possession of goods sold on credit, the vendee having become insolvent before delivery, against a sheriff, who claimed to hold the goods under attachments against the vendee, the plaintiff asked the court to instruct the jury as follows: "That if O. & C. (warehousemen), received the goods from the railroad company, in the usual course of their business as commission merchants, for storage, and not as the agents of H., (the vendee), and had no authority from H. to receive the goods, and were not the agents of H., then the right of stoppage *in transitu* was not determined, and plaintiff had a right to stop them by writ of replevin, provided the said H. became insolvent before the arrival of the goods, and after he purchased them," which instruction was refused; *Held*, That the court erred in refusing the instruction. *Ib.*

8. And where in such an action, the court instructed the jury as follows: 1. "That if the goods were delivered to O. & C., and were held by them subject to the order of H., and were attached by defendant in a suit against H., before plaintiff claimed and got possession of the goods, then the attaching creditors of H. will hold said goods as against the plaintiff in this suit;" *Held*, That the court erred in giving the instruction. *Ib.*

VENUE.

1. An action against a non-resident defendant, to recover damages for the alleged fraud of the defendant in the sale of real estate situated in Boone county, commenced by attachment in the Boone county district court. The plaintiff had received a warrantee deed of the premises, and executed to the defendant a mortgage to secure the payment of a portion of the purchase money. Two writs of attachment were issued—one directed to the sheriff of Boone county, and the other to the sheriff of Polk. The writ directed to the sheriff of Boone county, was returned served, by attaching the land conveyed to the plaintiff, and on which the defendant held a mortgage. The writ directed to the sheriff of Polk, was served by attaching certain real estate of defendant, situate in that county. There was no service of any kind on the defendant. At the return term, the defendant appeared specially, and moved that the venue in said cause be changed to Polk county, which motion was overruled; *Held*, That the district court of Boone county had no jurisdiction of the cause; and that the court erred in overruling the motion. *Courtney v. Carr*, 238.

2. An application for a change of venue, on the ground that the defendant resides in a different county from that in which the suit is brought, is not an *ex parte* question. *Turner v. Maddox*, 489.

3. Where there is application for a change of venue, for the reason that the suit is brought in a different county from that in which the defendant resides, the plaintiff should be heard upon the question of residence, and permitted to show that he has commenced his action in the proper county. *Id.*

4. Where a rule of the district court regulated the time of making application for a change of venue; and where on the morning of the day set for the trial of the cause, the defendant filed his motion for a change of venue, founded upon an affidavit, that the plaintiff had such an undue influence over the inhabitants of that county, that he could not expect an impartial trial, which motion was made without previous notice to the adverse party, and without the showing of any cause why it was not sooner made; and where the plaintiff filed a counter-affidavit, and moved to strike the application for a change of venue from the files, for the reason that it was not filed within the time required by the rules of court—which motion was sustained; *Held*, That the court did not err in overruling the application for a change of venue. *Demoss v. Noble*, 580.

VERDICT.

1. A justice of the peace possesses no power to set aside the verdict of a jury in a criminal case. *Dupont v. Downing*, 172.

2. Where a complainant in equity claimed title to two lots in the city of Council Bluffs, and alleged that he, and those under whom he claims, had the right to said property, as occupying claimants, prior, and up to the time the land was entered by the county judge, under the act of Congress, entitled "An act for the benefit of citizens and occupants of the town of Council Bluffs, in Iowa," and approved April 6, 1854, and the laws of the State of Iowa, and at the time the said county judge conveyed the same to the respondents; that the possession of the respondents, if any they had, was by force and fraud, with a full knowledge of the rights of complainant; and that he was entitled to a deed from the county judge—all of which was denied by the answer; and where it appeared from the record, that a jury was "impanelled and sworn, to well and truly try the present issue joined, and a true verdict render according to law and evidence," which jury returned a verdict as follows: "We, the jury, find that the defendants are entitled to the possession and occupancy of the lots of land in question, on the 6th day of April, 1854," and thereupon the court rendered a judgment as follows: "It is therefore considered by the court that the plaintiff take nothing by his bill, and that the defendants have and recover of and from the said plaintiff their reasonable costs, and that execution issue therefor;" *Held*, That the verdict of the jury was on an immaterial issue, and settled nothing; and that the court erred in dismissing the bill. *Hall v. Doran*, 433.

3. It is not necessary that the verdict of a jury, whether rendered in open court, or sealed up and handed to the clerk, should be signed by the jurors. *Miller v. Mabon*, 456.

4. At the close of a trial, the parties agreed that the jury might seal up their verdict and hand it to the clerk, and thereupon the court adjourned until next morning. During the adjournment, the jury returned and delivered to the clerk their verdict, finding for the plaintiff, but it was not signed by either of the jurors. On the next morning, the verdict was read, and the defendant's counsel objected to the same, because it was not signed by the jurors. The jury was then re-called, in open court, into the box;

and again, without objection by either party, retired to sign their verdict. After being out some time, they sent a written statement to the court, signed by all the jurors, to the effect that they could not agree upon a verdict. They were brought into court and asked, if the verdict sealed up by them and delivered to the clerk, was not their verdict at the time, to which several of the jurors replied, and all assented, saying that it was their unanimous verdict, and assented to by all the jurors, at the time it was sealed and delivered to the clerk. The jury was then discharged, and plaintiff moved for judgment on the verdict so sealed and handed to the clerk, which motion was overruled; *Held*, 1. That the plaintiff was entitled to judgment upon the verdict as returned, in the first instance, by the jury; 2. That the jury, after their separation, could not be allowed to say, that it was not their verdict; 3. That the fact that the plaintiff did not object to the jury going out to sign their verdict, did not conclude him from moving for judgment on the original verdict. *Ib.*

5. Where in an action on a promissory note, the jury returned a verdict as follows: "We, the jury, find for the plaintiff, for the note and interest;" and where the court referred the cause to the clerk to assess the damages, who reported the same to the court, and thereupon judgment was rendered against defendant by the court for the amount so reported by the clerk, with costs; *Held*, 1. That the intention of the jury was sufficiently indicated by the language of the verdict; 2. That the action of the court in referring the assessment of damages to the clerk, was nothing more than reducing the verdict to proper form. *Stevens v. Campbell*, 538.

6. Under the act entitled "An act authorizing mill dams," approved January 24, 1855, certain facts are to be ascertained by the jury; and when ascertained and reported to the court, their finding or verdict must be deemed as conclusive upon the matters submitted to them, as the verdict of a jury in any other case. *Gammell v. Potter*, 548.

7. Until the verdict of a jury summoned under the act authorizing mill dams is set aside, their ascertainment of damages must be considered conclusive; and if the applicant elects to pay the damages, he is entitled to a license for the erection of the dam, if it is further ascertained by the jury, that no dwelling house, &c., will be overflowed, or injuriously affected by it, and if it further appears to the court that the same is reasonable, and for the public benefit. *Ib.*

WAIVER.

1. By pleading over and going to trial, a party waives his demurrer to the pleadings demurred to. *Abbott v. Stribley*, 191.

2. By answering over, a party waives his objection to the pleadings demurred to. *McGinnis v. Hart et al.*, 204.

WITNESS.

1. In a criminal case, the State is not confined to the witnesses upon whose testimony the charge is founded, and whose names are indorsed on the indictment. *The State v. Abrahams*, 117.

2. Section 2913 of the Code, which provides that the names of the material witnesses for the State, examined before the grand jury, must be indorsed upon the indictment, is not to be extended beyond its actual provision; and does not go to the extent, that the State cannot introduce witnesses discovered subsequently to the finding of the indictment. *Ib.*

3. Where a promissory note is lost after suit brought, the attorney for the plaintiff is a competent witness to prove its loss, and that a

copy of the note annexed to the petition, is a true copy ; and after such proof, the copy of the note is admissible in evidence. *Abbott v. Striblen*, 191.

4. Where in a criminal case, a wife is introduced as a witness in favor of her husband, under section 2391 of the Code, it is error for the court to instruct the jury, that "her testimony, at all events, should be received with great caution." *The State v. Guyer*, 263.

5. In such cases, the testimony of the wife is to be received, and her credibility tested, by the same rules which apply to all other witnesses. *Ib.*

6. Where two physicians, S. and F., were called as experts, to testify as to the tests applied in the chemical analysis made of the stomach of the deceased, and of the tests usually applied for detecting the existence of poison in such cases, and one of them stated that he was not a professional chemist, but understood some of the practical details of chemistry ; that portion, at least, which pertained to his profession ; that he had no practical experience in the analysis of poisons, until, in connection with F., he analysed the contents of the stomach of the deceased ; that since that time, he had conducted experiments on a small scale ; and that he was previously acquainted with the means of detecting poisons, and had since had some experience in that way ; and where the other testified that he was not a practical chemist ; that he did not follow the science as a profession ; that he understood the chemical tests by which the presence of strychnine can be detected ; that he professed to understand the principles of chemistry as taught in the books on that science ; that he never experimented with a view to detect strychnine by chemical tests ; that he had seen experiments by professors of chemistry ; and that there was one test much relied on, the trial of which he had witnessed ; and where the witnesses were objected to as incompetent, for want of the requisite professional skill, which objection was overruled ; *Held*, That the witnesses were competent. *The State of Iowa v. Hinkle*, 380.

7. Where a party in a suit issues a subpoena for his adversary, to appear and testify in the cause, which is returned not served, he cannot be admitted as a witness for himself, under section 2421 and 2422 of the Code. In order to make himself a competent witness, he must show that the other party has been served with a subpoena, and that he has failed to appear. *Stevens v. Campbell*, 538.

8. Where a party to a suit calls upon his adversary to answer or reply under oath, and such answer or replication is made, he is not entitled to a continuance of the cause, in order to procure the attendance of the party making the answer or replication under oath, as a witness, to testify concerning the matters embraced in the sworn answer or replication. *Ib.*

9. Where it is assigned as error, that the court permitted a witness to testify who was incompetent, the record should disclose the substance of the testimony given by the witness, or that it was material. *Speers v. Fortner*, 553.

10. Where in an action commenced by attachment, the plaintiff, on the trial, offered as a witness one of his sureties on the attachment bond, who was objected to by the defendant, on the ground of interest, but the objection was overruled, and the witness allowed to testify ; and where the record did not disclose the testimony given by the witness, nor show that it was material ; *Held*, That it did not appear from the record, that the appellant was prejudiced by the admission of the witness. *Ib.*

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